

said injunction be made perpetual, and your petitioners as in duty bound will ever pray.

VICTORIA, FISHER & WESTERN
RAILROAD COMPANY,
LOUISIANA LONG LEAF LUMBER
COMPANY,

By H. M. GARWOOD,
L. M. WALTER,
Their Solicitors.

58-236 STATE OF MISSOURI,
County of Jackson:

W. W. Warren, being duly sworn, on oath says that he is the Gen'l Manager of the petitioner Victoria, Fisher & Western Railroad Company, and as such is authorized to make this affidavit; that he has read the above and foregoing petition and is familiar with the facts therein stated and all allegations of fact therein made are true and where made on information and belief, he believes them to be true.

[SEAL.]

W. W. WARREN.

Subscribed and sworn to before me this 10th day of January,
A. D. 1913.

A. M. HANCOCK,
Notary Public in and for Jackson County, Missouri.

STATE OF MISSOURI,
County of Jackson:

J. B. White, being duly sworn, on his oath states that he is the Secretary of petitioner Louisiana Long Leaf Lumber Company, and as such is authorized to make this affidavit; that he has read the above and foregoing petition and is familiar with the facts therein stated; that the allegations and averments of fact herein made are true, and where made on information and belief, he believes them to be true.

[SEAL.]

J. B. WHITE.

Subscribed and sworn to before me this the 10th day of January,
A. D. 1913.

A. M. HANCOCK,
Notary Public in and for Jackson County, Missouri.

(Here follows map marked page 59.)

Note by Clerk.

(Report and opinion of the Interstate Commerce Commission, April 23rd, 1912, Supplemental report and opinion May 14, 1912, and amended order of the Interstate Commerce Commission, Oct. 30, 1912, are omitted here in printing because printed elsewhere in a separate volume.)

237

Original.

Notice to Attorney General.

(Filed January 16, 1913.)

United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA
LONG LEAF LUMBER COMPANY, Petitioners,

VS.

THE UNITED STATES OF AMERICA, Respondent.

The President of the United States to Honorable George W. Wickersham, as Attorney General of the United States:

You are hereby notified that a petition has been filed in the above entitled case in the office of the Clerk of the United States Commerce Court at Washington, D. C., copy of which is herewith served by filing said copy in the Department of Justice.

In case no answer shall be filed to said petition within thirty days after such service, the petitioner may apply to the Court on notice for such relief as may be proper upon the facts alleged in said petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 14th day of January A. D. 1913.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Duplicate of above notice and copy of Petition served upon Honorable George W. Wickersham, Attorney General of the United States, this 15th day of January A. D. 1913. (Accepted by Blackburn Esterline.)

F. J. STAREK, *Marshal,*
By JAMES L. MURPHY,
Deputy Marshal.

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Original.

Notice to Secretary of Interstate Commerce Commission.

(Filed January 16, 1913.)

United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA
LONG LEAF LUMBER COMPANY, Petitioners,

vs.

THE UNITED STATES OF AMERICA, Respondent.

The President of the United States to John H. Marble, as Secretary
of the Interstate Commerce Commission:

You are hereby notified that a petition has been filed in the above
entitled case in the office of the Clerk of the United States Commerce
Court at Washington, D. C., copy of which is herewith served by
filing said copy in the office of the Secretary of the Interstate Com-
merce Commission.

In case no answer shall be filed to said petition within thirty days
after such service, the petitioner may apply to the Court on notice
for such relief as may be proper upon the facts alleged in said
petition.

Witness the Honorable Martin A. Knapp, Presiding Judge of the
United States Commerce Court, this 14th day of January A. D. 1913.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

Duplicate of above notice and copy of Petition served upon John
H. Marble, Secretary of the Interstate Commerce Commission, this
15th day of January A. D., 1913.

F. J. STAREK, *Marshal.*

By JAMES L. MURPHY,

Deputy Marshal.

239

In the United States Commerce Court.

No. 93.

VICTORIA, FISHER AND WESTERN R. R. Co. and LOUISIANA LONG
LEAF LUMBER Co., Petitioners,

v.

THE UNITED STATES, Respondent.

Answer of the United States.

(Filed January 29, 1913.)

Comes now the United States, respondent, by its counsel, not
waiving but insisting upon the insufficiency in law of the petition,
and answers as follows upon information and belief:

I.

The order of the Interstate Commerce Commission sought by this petition to be set aside and annulled, and the report of the commission rendered therewith, and the findings of fact stated in said order and report, were made upon due hearing and due investigation, and upon substantial and sufficient evidence and due consideration thereof.

II.

The Interstate Commerce Commission did not, in any particular, act unreasonably, arbitrarily, or otherwise improperly.

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III.

The Interstate Commerce Commission, after due hearing and upon substantial evidence, found that the tracks and equipment of the Victoria, Fisher and Western Railroad Company were formerly owned by the Louisiana Long Leaf Lumber Company; that the lumber company in exchange for said tracks and equipment received the capital stock of the Victoria, Fisher and Western Railroad Company upon its incorporation; that the stock of said railroad company was issued as a dividend to the stockholders of said lumber company; that the stock in the two companies is held by the same persons and in the same relative proportions; and that the two companies have the same officers.

IV.

The Interstate Commerce Commission after due hearing and upon substantial evidence found that the tracks and equipment of the Victoria, Fisher and Western Railroad Company with respect to the industry of the Louisiana Long Leaf Lumber Company, are plant facilities, and that the service performed therewith for the Louisiana Long Leaf Lumber Company in moving logs from the forest to the mill and in moving the products of the mill to the trunk lines (except from the mill at Fisher to the Kansas City Southern Railroad and from the mill at Victoria to the Texas and Pacific Railroad) is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations.

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V.

Respondent denies that the commission's order herein complained of permits other tap lines to receive allowances from trunk-line railroads for services rendered their proprietary companies which are substantially similar to the services rendered to the Louisiana Long Leaf Lumber Company by this petitioner or that the commission's order in any other manner discriminates against petitioner.

VI.

Respondent denies the allegations on page 48 of the petition in so far as they imply that the trunk lines had universally, or even in a majority of instances, extended the blanket rates through the mills of the proprietary lumber companies to the trees of the forest, and calls attention to the finding of the Commission (23 I. C. C., 281, 283, 284, 297, and 298) to the effect that the majority of tap lines in this vicinity receive no allowances whatever for the tree-to-mill haul, and alleges that said finding was based on substantial evidence.

VII.

Respondent has no knowledge or information sufficient to form a belief as to the causes which induced the trunk line railroads to cancel their allowances to petitioner or whether said trunk
242 lines would continue to pay said allowances were it not for the order of the Commission herein complained of.

VIII.

For the purposes of this case, respondent admits the allegations of fact in the petition which are not denied or specifically referred to above and which are not inconsistent with the findings made by the order and report of the Commission.

Wherefore having fully answered said petition this respondent prays that said petition be dismissed with costs.

WINFRED T. DENISON,
Assistant Attorney General.

January, 1913.

243 In the United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA
LONG LEAF LUMBER COMPANY, Petitioners,

v.

THE UNITED STATES OF AMERICA, Respondent.

Answer of the Interstate Commerce Commission.

(Filed February 8, 1913.)

The Interstate Commerce Commission, intervening respondent in the above-entitled-cause, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

I.

244 That this court has no jurisdiction of the controversy, matters and things respectively set forth in said petition, nor does it possess general equity jurisdiction to grant the relief, or any part thereof, prayed for.

II.

This respondent admits that it made and entered the order set forth in said petition bearing date September 3, 1910, In the Matter of the Investigation and Suspension of Supplement No. 3 to I. C. C. No. 23; that it made and entered the order January 16, 1912, set forth in said petition. It admits and alleges that after due and full hearing, as required by the statute, it made and filed in the proceeding known as Investigation and Suspension Docket No. 11, its original report, under date, April 23, 1912, which report is set forth in volume 23 of its printed reports (I. C. C. Rep.) beginning at page 277, and thereafter—May 14, 1912—it made and filed the supplemental report set forth in said petition and in said volume 23 (I. C. C. Rep.) beginning at page 549; that on the 14th day of May, 1912, it made and entered the order in said matter set forth in said petition.

This respondent admits the filing of the petition by L. M. Walter, attorney for petitioners, as set forth in said petition, and that thereafter, on October 30, 1912, this respondent, at the request of said petitioners, made and entered the amended order set forth in said petition. This respondent admits that it made the decision and report referred to in said petition and reported in its published
245 reports, volume 17 (I. C. C. Rep.), beginning at page 338; and this respondent admits that the trunk lines, so called in said petition, withdrew their tariffs and filed new tariffs at the times, and substantially in form as stated in said petition.

III.

This respondent neither admits nor denies the particular matters and things set forth in said petition regarding the organization of the several petitioning companies, and the several stockholdings set forth in said petition, nor has it any knowledge regarding the business and the amount thereof of the several petitioners or of either of them, excepting as the facts relevant and pertinent to the issue were proved in the said proceedings and matters before this respondent, in which matters the said reports and orders of this respondent were entered; and this respondent avers that the facts presented to and the conclusions reached thereon by this respondent in said investigation (I. and S. D. No. 11), regarding the said allegations contained in the petition herein, are set forth in the original report thereof, appearing in volume 23 of this respondent's published reports (I. C. C. Rep.), beginning at page 277, and in the supplemental report in said investigation reported in said volume 23, beginning at page 549, and in the several orders entered thereon; and this respondent makes said original and supplemental reports and

each of them, and the orders entered thereon, a part of this answer for and as its statement of the facts in this controversy; and
246 respondent begs leave to make the same use of said published reports in its defense herein as it could make if the original and supplemental reports and said orders respectively were each set forth in full in this answer.

IV.

This respondent denies each and every allegation in said petition which in effect or by inference alleges that this respondent in the matters aforesaid erroneously determined or decided any questions of law, or that it acted in any respect arbitrarily, or that this respondent in making said orders, or either of them, herein complained of, acted without substantial evidence produced at said hearing to support the same, or that in the making and enforcement of said orders, herein complained of, or either of them, the petitioners or either of them, have suffered or will suffer any violation or infraction of their constitutional rights or privileges.

This respondent denies each and every allegation in said petition not herein expressly admitted, or which is contrary to the or any facts stated in this answer or in respondent's said original or supplemental reports or orders.

All of which matters and things this respondent is ready to aver, maintain, and prove as this honorable court shall direct, and prays the same advantage as to each and all the matters and things aforesaid as this respondent would be entitled to if the same were specially pleaded, or set forth by way of demurrer, or motion to dismiss the petition.

247 And having fully answered said petition, this respondent prays to be hence dismissed with its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,
By CHARLES W. NEEDHAM, *Its Solicitor*.

CITY OF WASHINGTON,
District of Columbia, ss:

James S. Harlan, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-entitled respondent, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true as to the matters within the knowledge of the commission, and as to the other matters he believes it to be true.

JAMES S. HARLAN.

Subscribed and sworn to before me, George B. McGinty, a notary public within and for the District of Columbia, this 8th day of February, 1913.

[SEAL]

GEORGE B. MCGINTY,
Notary Public.

248 *Petition for Leave to Intervene of A., T. & S. F. Ry. Co. et al.*

(Filed February 10, 1913.)

In the United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al.,
Petitioners,

v.

THE UNITED STATES OF AMERICA, Respondent.

Petition for Leave to Intervene.

Come now The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company, and say that they were parties to the original proceedings before the Interstate Commerce Commission, out of which the above entitled litigation springs, and that they are interested directly and financially in any disposition of this cause, and therefore they ask an order allowing them to intervene and to be heard in all proceedings in said cause, and to have the benefit of all orders and decrees that may be entered herein.

Your intervening petitioners further state that they are common carriers by railroad with rails extending from extensive lumber producing territory to various markets; that the milling industries located upon the railroads of intervening petitioners are competitors with the milling industries located upon the line of petitioners; that the through rates applying for the carriage of lumber from the industries located upon the lines of intervening petitioners and the milling industries located upon the lines of petitioners are known as the blanket system of rates.

249 Your intervening petitioners further state that they make no allowance or division of through rates to tap lines or to milling industries on the lines of intervening petitioners, and as a result the milling industries located upon the lines of intervening petitioners are required to pay in full the lawfully published tariff rate on lumber. Your intervening petitioners further state that the allowance to said petitioners of a division of the through rate will give said petitioners an undue advantage over the milling industries located upon the lines of intervening petitioners, and will constitute an unjust discrimination against such milling industries located upon the lines of intervening petitioners, and will be in violation of the Interstate Commerce law.

Your intervening petitioners further state that any allowance to the petitioners herein will not be in truth an allowance to a railroad for the service of transportation of lumber but on the contrary will be an allowance to the milling industry for an operation incident to the manufacture of lumber, and will constitute a device for the

payment of a rebate to a shipper, in violation of the Interstate Commerce Law.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,
GULF, COLORADO AND SANTA FE
RAILWAY COMPANY,

By ROBERT DUNLAP,
T. J. NORTON,
JAMES L. COLEMAN,
Their Attorneys.

February 10, 1913.

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In the United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD Co. et al.

v.

THE UNITED STATES OF AMERICA.

Order of Intervention.

(Entered February 10, 1913.)

The Atchison, Topeka & Santa Fe Railway Company and Gulf, Colorado and Santa Fe Railway Company having filed and presented their petition for intervention herein and it appearing to the Court from the said petition that the petitioners have shown that they have sufficient interest in the proceedings herein to entitle them to intervene and be heard by their counsel:

It is ordered, That The Atchison, Topeka & Santa Fe Railway Company and Gulf, Colorado and Santa Fe Railway Company be and they are hereby allowed to intervene and become parties intervener and to be heard by their counsel in all the proceedings had and taken in the above entitled cause, the Court reserving the right at all times hereafter to enter such other and further order or orders concerning the right of the said interveners to appear and be heard herein, and to enter such rule or rules concerning the pleadings of the said interveners and their course of procedure, as to the court shall seem wise and proper.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

251 In the United States Commerce Court.

In Equity.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al., Petitioners,

vs.

THE UNITED STATES OF AMERICA et al., Respondents.

Petition of Intervention of the Railroad Commission of Louisiana.

(Filed February 10, 1913.)

Ruffin G. Pleasant, Attorney General; Wylie M. Barrow, Assistant Attorney General; Solicitors for the Railroad Commission of Louisiana.

252 In the United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al., Petitioners,

vs.

THE INTERSTATE COMMERCE COMMISSION et al., Respondents.

Motion on Behalf of the Railroad Commission of Louisiana for Permission to Intervene as Party Petitioner and to be Represented by Counsel and to File Brief in the Above Entitled Suit.

Comes now the Railroad Commission of Louisiana, through its undersigned counsel, and moves this Honorable Court for an order granting permission to it to enter appearance, to be made party intervener, as petitioner, to be represented by counsel, and to file brief in the above entitled suit, and as grounds for such motion, shows that it, through its then constituent members, J. J. Meredith, Shelby Taylor and Henry B. Schreiber, was an intervener in the Matter of the Tap Line Allowances and Divisions, being Docket Numbers 3400, Sub. 6, 3400, Sub. 7, 3493, 3411, 3512, 3513, 3514, 3524, 3551, 3552, and 3564, consolidated under Investigation and Suspension Docket No. 11, and known as the "Tap Line Case," before the Interstate Commerce Commission, in which case the said Interstate Commerce Commission made the orders attacked in the above entitled cause, and that it is interested in having the orders of the said Interstate Commerce Commission, in so far as they refer to petitioner, a common carrier, duly incor-

porated and operating under the laws of the State of Louisiana, annulled and set aside.

THE RAILROAD COMMISSION OF LOUISIANA,

SHELBY TAYLOR, *Chairman,*

HENRY B. SCHREIBER,

B. A. BRIDGES,

Commissioners,

By RUFFIN G. PLEASANT,

Attorney General, State of Louisiana,

W. M. BARROW,

Assistant Attorney General,

Solicitor for the Railroad Commission of

Louisiana, Intervening Petitioner.

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In the United States Commerce Court.

Docket No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et als,
Petitioner-,

vs.

THE UNITED STATES OF AMERICA et al., Respondent-; THE RAILROAD
COMMISSION OF LOUISIANA, Intervener.

To the Honorable the Judges of the United States Commerce Court:

The Railroad Commission of Louisiana, composed of Shelby Taylor, Chairman, Henry B. Schreiber and B. A. Bridges, Commissioners, a political corporation created, organized and existing under and by virtue of the laws of the State of Louisiana, having its domicile in the city of Baton Rouge, Parish of East Baton Rouge, State of Louisiana, for the reasons hereinafter set forth, asks leave to intervene and be made a party to this cause, in behalf of plaintiffs.

I.

Because the Victoria, Fisher & Western Railroad Company is a railroad corporation duly and legally chartered, incorporated and existing under the laws of the State of Louisiana, and is under the laws of the State of Louisiana, a common carrier of freight
255 subject, as to its freight tariffs and service between and at points in the State of Louisiana, to regulation and control by the Railroad Commission of Louisiana. That the said Victoria, Fisher & Western Railroad Company, petitioner, is operating a railroad in Louisiana, in accordance with the laws of the State of Louisiana, and is subject to the rules and regulations governing railroads adopted by the Railroad Commission of Louisiana. That said petitioner, the Victoria, Fisher & Western Railroad Company, accepts and transports shipments at and between points on its said line of railroad in Louisiana and has filed with the Railroad Commission

of Louisiana, tariffs containing class and commodity rates, which have been approved by the Railroad Commission of Louisiana to apply on shipments so transported. That it has been engaged in the business of a common carrier since the Railroad Commission of Louisiana was organized in 1898, and for some time previous thereto.

II.

That there are numerous shippers living along the line of railroad of the Victoria, Fisher & Western Railroad Company, who ship and receive interstate and intrastate freight over the said railroad and who are interested in securing fair and reasonable rates and adequate service, for the transportation of all classes and kinds of freight, including lumber, over the Victoria, Fisher & Western Railroad.

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III.

That Act No. 195 of the Legislature of 1906 of the State of Louisiana provides:

"That power and authority is hereby vested in the Railroad Commission of Louisiana, and it is hereby made its duty, to appear, through any of its commissioners, or its secretary, or by a duly authorized attorney, before the Interstate Commerce Commission at Washington, D. C., or at any place where the said Interstate Commerce Commission might be holding a session, whenever, in the judgment of the said Railroad Commission of Louisiana, the interests of shippers or consignees in the State of Louisiana may require it."

That acting under and by virtue of Act No. 195 of the General Assembly of the State of Louisiana of 1906, the Railroad Commission on January 31st, 1913, adopted the following resolution:

"Whereas, the Commission has learned that various suits have been filed in the Commerce Court at Washington, D. C., by the so-called 'tap lines' operating in the State of Louisiana; and

"Whereas, the following so-called 'tap lines,' Mansfield Railway & Transportation Company, Woodworth & Louisiana Central Railway Company, Limited, Victoria, Fisher & Western Railroad Company, and Louisiana & Pacific Railway Company, are among those 'tap lines' which have filed such suits, and which railways are duly chartered under the laws of the State of Louisiana as common carriers, and which, in fact, operating as common carriers in the said State, are under the supervision and control of the Railroad Commission of Louisiana; and

"Whereas, the said suits in the Commerce Court have been filed for the purpose of contesting the orders of the Interstate Commerce Commission, declaring that, in substance, such 'tap lines' are not common carriers as to the logs and lumber which they transport for their proprietary lumber companies; and

"Whereas, this Commission is of the opinion that this decision of the Interstate Commerce Commission is an unconstitutional interference with the rights of the said railway companies to receive revenue out of joint through rates of the transportation of lumber and

logs over their lines in Louisiana destined to interstate points; and

"Whereas, it is the opinion of this Commission that the decision of the Interstate Commerce Commission in the 'tap line case' is detrimental to the interests of the shippers of the State of Louisiana, and deprives the shippers, served by said railway companies, of the right to ship logs and lumber over said railways at reasonable joint through rates and deprives the said railway companies from receiving a reasonable division out of joint through rates, which division of rates is the principal source of revenue of such carriers; and

"Whereas, if the said companies are not permitted to receive divisions of joint through rates on lumber and logs, they will be deprived of revenues for transporting the said logs and lumber, thereby rendering it impossible to meet the operating expenses and fixed charges, and consequently preventing any extension, or hope of extension, or improvement, or hope of improvement of such railways;

"Therefore, be it resolved, that the Railroad Commission of Louisiana, in behalf of the shippers of the State of Louisiana, hereby authorizes and instructs its attorney, the Assistant Attorney General of Louisiana, to intervene in the Commerce Court in the cases filed by the railway companies, hereinabove named, in support of their petitions, and to aid and assist, in every way possible, in having the Court recognize the said railway companies as common carriers of interstate shipments of logs and lumber, as they are recognized to be common carriers of all other classes and kind of shipments."

IV.

That, pursuant to the various appropriate orders made by the Interstate Commerce Commission, in the case of *Star Grain & Lumber Company, et al., vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, Docket No. 1319, as set forth and referred to in Paragraphs III, IV, V, VI, VII, VIII and IX of the petition filed in this cause, the Railroad Commission of Louisiana, believing the shippers and general public living along the line of the Victoria, Fisher & Western Railway Company were interested in the proceeding instituted by the Interstate Commerce Commission, entitled:

"Investigation and Suspension Docket No. 11. In the Matter of the Investigation and Suspension of Schedules Canceling Through Rates with Certain Tap Connections."

259 on or about the 9th day of December, 1910, filed a petition of intervention on behalf of the shippers of the State of Louisiana, and were operating their railroads as common carriers under and by virtue of their charters, one of which railroads was that owned and operated by the Victoria, Fisher & Western Railway Company. That the said Railroad Commission of Louisiana thereafter filed a brief and took part in the oral argument before the Interstate Commerce Commission, in support of the rights of the shippers who ship and receive freight, over the lines of railroad owned and operated by the common carriers, who, for the purposes of the proceed-

ings before the Interstate Commerce Commission were, and have since been, designated as "tap lines." That one of the said common carriers in which the Railroad Commission was and is interested as a vehicle and means of intrastate transportation for the use of the public in the State of Louisiana is the Victoria, Fisher & Western Railway Company, plaintiff in this cause.

V.

Your petitioner further states that the Victoria, Fisher & Western Railroad Company is an important railroad, performing a valuable service in the development of the section of the State of Louisiana through which its railroad runs; that the people living along such railroad are dependent upon it for the transportation of their
260 products and their merchandise to and from the towns, cities and markets of the country. That they are entitled to ship and travel at fair and reasonable local and joint through interstate, as well as intrastate rates; that an important commodity shipped over the said railroad is lumber, and that, while the said railroad is required by the laws of the State of Louisiana and the rulings of the Railroad Commission of Louisiana to establish reasonable local rates and joint through rates in connection with the trunk lines with which it connects on Louisiana intrastate shipments, and is permitted by the Interstate Commerce Commission to establish joint through rates, and receive divisions therefrom, to and from interstate points on all classes and commodities, except lumber, on shipments of lumber the said Victoria, Fisher & Western Railroad Company is not permitted to receive a division out of joint through interstate rates.

VI.

That in declaring an allowance out of joint through rates on lumber to be unlawful, the Interstate Commerce Commission has deprived the said Victoria, Fisher & Western Railroad Company of an important source of revenue, which it earns by performing a transportation service, and to which it is entitled as a common carrier, the only legal restrictions upon such allowance being that it must be reasonable, and in thus denying an allowance out of through interstate rates on lumber to the Victoria, Fisher & Western
261 Railroad Company, and depriving it of this important source of revenue, an undue burden and unnecessary hardship, and an unjust discrimination has been enacted and placed upon shippers of other commodities than lumber who use plaintiff's railroad, thus depriving the State of Louisiana of the natural development and increase in property values which follow the extension and improvement of railroad properties where the legitimate revenues from the operation of such properties lead to their betterment.

Your petitioner further avers that by depriving the Victoria, Fisher & Western Railroad Company of a division of the earnings from interstate shipments of lumber, made in connection with the trunk lines with which it connects, the Interstate Commerce Commis-

sion has thrown upon the smaller tonnage of general commodities, other than lumber, the entire burden of producing a sufficient revenue to pay all the fixed and operating expenses of the Victoria, Fisher & Western Railroad Company, and, as a result of such a burden, your petitioner fears that the Victoria, Fisher & Western Railroad Company's revenues will so diminish as to cause it to become bankrupt, and thereby seek, through proper legal means, to dissolve its charter, cease its operations, and go out of business as a common carrier, leaving many of the citizens of Louisiana, who are served by said Railroad Company, totally without means of transportation. That such a result will deprive the citizens of Louisiana of their right to be served by common carriers, properly organized under its laws, under the same conditions and circumstances as are accorded to the trunk lines.

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VII.

And petitioner further avers that should the Victoria, Fisher & Western Railroad Company be deprived of its right to receive a fair division of reasonable joint through interstate rates for the transportation of lumber, it will cause an unjust discrimination, is arbitrary, unreasonable and unjust.

VIII.

Your petitioner further avers that the Victoria, Fisher & Western Railroad Company is a common carrier by virtue of its charter, that it holds itself out as such, constantly acts in that capacity, and has been so treated by those who- it has served, by the great railroad systems with which it connects, by the State Board of Appraisers of the State of Louisiana, by the Railroad Commission of Louisiana, by the Supreme Court of the State of Louisiana, and, except as to the transportation of logs and lumber, in all other respects, by the Interstate Commerce Commission. That as a common carrier, exercising the right of eminent domain, it has received exemption from taxation under the Constitutional provisions, amendments thereof of 1908, of the State of Louisiana, having extended its lines during the period when such exemptions from taxation ran.

IX.

263 Petitioner further avers that the Victoria, Fisher & Western Railroad Company actually performs a part of the transportation of every shipment of lumber originating on its line, going to interstate destinations and accepts all shipments tendered it for such transportation.

X.

Your petitioner further avers that it is and has been the policy of the State of Louisiana to aid and encourage the development of its resources, the investment of capital in manufacturing industries, and to assist, whenever it can consistently do so, the producers of Louisiana, to secure and maintain equitable and fair rates, rules and regu-

lations affecting the transportation of persons and property between points in the State of Louisiana, and points in other States. That the Railroad Commission of Louisiana, as the authorized representative of the shippers of the State of Louisiana, is vitally interested in the outcome of this suit, in that it involves property rights, industrial enterprises and transportation problems, which affect the commerce of its citizens.

Wherefore, petitioner, the Railroad Commission of Louisiana, prays leave to file this intervention, and that it be made a party to this proceeding, and that the orders of the Interstate Commerce Commission, dated May 14, 1912, and October 31, 1912, be enjoined, set aside and annulled, all as is prayed for in the prayer of the original petition filed herein.

264 And your petitioner prays for all other and further relief as in equity and good conscience *they* may be entitled to receive.

THE RAILROAD COMMISSION OF LOUISIANA,

By W. M. BARROW,

Assistant Attorney General of Louisiana.

STATE OF LOUISIANA,
Parish of —:

Shelby Taylor, being duly sworn on his oath, states that he is Chairman of the Railroad Commission of Louisiana, the petitioner herein; that he has read the above and foregoing petition, and is familiar with the facts therein stated; and that the allegations and averments of fact made are, to the best of his knowledge, information and belief, true, and he believes them to be true.

SHELBY TAYLOR,

Chairman Railroad Commission of Louisiana.

Subscribed and sworn to before me, this 7th day of February, A. D. 1913.

[SEAL.]

R. H. FOWLER,
Ass't Sec'y of State.

265 In the United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al.

v.

THE UNITED STATES OF AMERICA et al.

Order of Intervention.

(Entered February 10, 1913.)

The Railroad Commission of Louisiana having filed and presented its petition for intervention herein and it appearing to the Court

from the said petition that the petitioner has shown that it has sufficient interest in the proceedings herein to entitle it to intervene and be heard by its counsel:

It is ordered, That the Railroad Commission of Louisiana be and it is hereby allowed to intervene and become a party intervener and to be heard by its counsel in all the proceedings had and taken in the above entitled cause, the Court reserving the right at all times hereafter to enter such other and further order or orders concerning the right of the said intervener to appear and be heard herein, and to enter such rule or rules concerning the pleadings of the said intervener and its course of procedure, as to the court shall seem wise and proper.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

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Journal Entry.

Proceedings of February 10, 1913.

Case- Nos. 90, 91, 92, 93.

No. 90.

LOUISIANA & PACIFIC RAILWAY Co. et al., Petitioners,

VS.

THE UNITED STATES OF AMERICA et al., Respondents; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

No. 91.

WOODWORTH & LOUISIANA CENTRAL RY. Co., LIMITED, et al.,
Petitioners,

VS.

THE UNITED STATES OF AMERICA et al., Respondents; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

No. 92.

MANSFIELD RAILWAY & TRANSPORTATION Co. et al., Petitioners,

VS.

THE UNITED STATES OF AMERICA, Respondent; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

No. 93.

VICTORIA, FISHER & WESTERN R. R. Co. et al., Petitioners,

VS.

THE UNITED STATES OF AMERICA, Respondent; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

Thereupon these causes came on for hearing upon the motion of the United States to dismiss for want of jurisdiction in open court

made, and the arguments of counsel were concluded, Mr. Assistant Attorney General Denison and Mr. Blackburn Esterline appearing on behalf of the United States, Mr. Charles W. Needham on behalf of the Interstate Commerce Commission, Mr. Luther M. Walter and Mr. H. M. Garwood on behalf of the petitioners, Mr. James L. Coleman on behalf of the intervening carriers, and Mr. Wylie M. Barrow on behalf of the Railroad Commission of Louisiana. Thereupon the cause was taken under advisement by the Court.

267 *Order Denying Motion to Dismiss for Want of Jurisdiction.*

(Entered February 24, 1913.)

United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA
LONG LEAF LUMBER COMPANY, Petitioners,

VS.

THE UNITED STATES OF AMERICA, Respondent; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

Order.

The above entitled cause came on for hearing before the Court on February 10, 1913, at Washington, D. C., upon the motion of the United States to dismiss for want of jurisdiction, in open court made; and the Court having given the arguments of counsel due consideration, now, on this 24th day of February, 1913,—

It is ordered and adjudged that said motion be, and the same is hereby, denied, the Court being of opinion that the order complained of is an order the validity of which this Court has jurisdiction to determine at the suit of the petitioners. The Court, however, in so deciding, in no way passes upon the merits of the case presented by the petition filed.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

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United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, Respondent; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

Order Designating Judge Carland to Hear Testimony.

(Entered March 5, 1913.)

In said cause it is ordered that the Honorable John E. Carland, Associate Judge of this Court, be and he is hereby designated to hear testimony and to rule upon the admissibility of evidence.

MARTIN A. KNAPP,
Presiding Judge.

269-284 *Certified Transcript of Testimony at Hearings at New Orleans, St. Louis and Chicago, December, 1910, January and February, 1911, in Proceeding Before the Interstate Commerce Commission, I. and S. Docket No. 11.*

(Filed in Commerce Court March 26, 1913.)

Note by Clerk.

(Transcript of testimony omitted here in printing because printed elsewhere in separate volumes.)

284a & b *Certified Copies of Exhibits in Proceeding Before Interstate Commerce Commission, I. & S. Docket No. 11. Filed May 8, 1913.*

The Interstate Commerce Commission certified to one set of exhibits applicable to cases Numbers 90, 91, 92 and 93, and which was used in the four cases. As directed by letter of H. M. Garwood, dated May 8, 1913, the following of those exhibits were printed for the use of the Commerce Court, viz:

Note by Clerk.

(Exhibits omitted here because printed elsewhere in a separate volume.)

284c-297 As directed by the same letter of H. M. Garwood, dated May 8, 1913, the following of those exhibits were omitted from the printing, viz:

Two time tables, L. & P. Ry. Co.
Petition, U. S. v. L. & P. Ry. Co.
Mortgage, Long-Bell Lumber Co., L. & P. Ry. Co.
Tariff sheets of various railroad companies.
Division sheets, W. & L. C. Ry. Co.
Statement, shipments of Gilmer Lumber Co.
Statement, shipments of 51 concerns.
Certain division sheets of various railroad companies.

Owing to the cumbrous and peculiar nature of the latter exhibits, they are not reproduced here. They are contained in the record on appeal in *Louisiana & Pacific Railway Co. v. United States*, No. 90, and are made a part hereof by reference the same as though fully incorporated herein.

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In the United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent, et al.

Objections to the Sufficiency of the Petition on Final Hearing.

(Filed June 2, 1913.)

Comes now the United States of America, by its counsel, on the final hearing hereof, and in accordance with the statute in such case made and provided, makes and enters the following objections to the sufficiency of the petition in the above entitled cause, viz:

First. The Court is without jurisdiction to entertain the said petition, because the order of the Interstate Commerce Commission sought to be set aside is a negative order;

Second. The Court is without jurisdiction to review the action of the Interstate Commerce Commission in refusing to establish through routes and joint rates between the petitioner and the trunk lines;

Third. The Court is without jurisdiction or power to issue an order in the nature of a writ of mandamus;

Fourth. There is a misjoinder of parties petitioners and respondents;

Fifth. The petition does not state any cause of action against the respondent.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

June 2, 1913.

Journal Entries.

Case- Nos. 90, 91, 92, and 93.

No. 90.

LOUISIANA & PACIFIC RAILWAY Co. et al., Petitioners,
vs.THE UNITED STATES OF AMERICA et al., Respondents; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

No. 91.

WOODWORTH & LOUISIANA CENTRAL RY. Co., LIMITED, et al.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA et al., Respondents; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

No. 92.

MANSFIELD RAILWAY & TRANSPORTATION Co. et al., Petitioners,
vs.THE UNITED STATES OF AMERICA, Respondent; INTERSTATE
COMMERCE COMMISSION et al., Interveners.

No. 93.

VICTORIA, FISHER & WESTERN R. R. Co. et al., Petitioners,
vs.THE UNITED STATES OF AMERICA, Respondent; INTERSTATE
COMMERCE COMMISSION et al., Interveners.*Proceedings of June 3, 1913.*

Said causes came on before the Court for final hearing upon the merits, and the arguments of counsel were commenced, Mr. Luther M. Walter appearing on behalf of the petitioners and Mr. W. M. Barrow on behalf of the Railroad Commission of Louisiana.

Proceedings of June 4, 1913.

Said causes came on before the Court for further hearing upon the merits, and the arguments of counsel were continued, Mr. Blackburn Esterline, Special Assistant to the Attorney General, appearing on behalf of the United States, Mr. James L. Coleman on behalf of the Atchison, Topeka & Santa Fe Railway Company, and Mr. Charles W. Needham on behalf of the Interstate Commerce Commission.

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Journal Entries.

(Continued.)

Case Nos. 90, 91, 92, and 93.

Proceedings of June 5, 1913.

Said causes came on before the court for further hearing upon the merits, and the arguments of counsel were continued, Mr. Charles W. Needham appearing on behalf of the Interstate Commerce Commission and Mr. H. M. Carwood on behalf of the petitioners.

Proceedings of June 6, 1913.

Said causes came on before the court for final hearing upon the merits, and the arguments of counsel were concluded, Mr. H. M. Carwood appearing on behalf of the petitioners. Thereupon Mr. Carwood was given leave to file a memorandum of additional authorities, and Mr. Esterline was given leave to file a memorandum as to exhibits. Thereupon the causes were taken under advisement by the Court.

Note by Clerk.

(Opinion by Mack, J., Nov. 26, 1913, omitted here in printing because printed elsewhere in a separate volume.)

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Final Decree.

(Entered November 28, 1913.)

United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al., Petitioners,

v.

THE UNITED STATES OF AMERICA, Respondent.

The above case having been submitted for final hearing upon pleadings and proofs, and due consideration thereof having been had, It is ordered and adjudged that the motion made by the Interstate Commerce Commission to strike from the record all oral evidence taken in this Court be and the same is hereby granted.

It is further ordered and adjudged that the motion to dismiss for want of jurisdiction be and the same is hereby denied.

It is further ordered and adjudged that that portion of the amended Order of the Interstate Commerce Commission made October 30th, 1912, which is in the following language:

"That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences are unjust discriminations, as found in the said reports:

3. It is Ordered, That the principal defendants, the Chicago, Rock Island & Pacific Railway Company; St. Louis & San Francisco Railroad Company; New Orleans, Texas & Mexico Railroad Company; Beaumont, Sour Lake & Western Railway Company; St. Louis, Iron Mountain & Southern Railway Company; The Texas & Pacific Railway Company; International & Great Northern Railway Company; The Missouri, Kansas & Texas Railway Company of Texas; St. Louis Southwestern Railway Company; St. Louis Southwestern
331 Railway Company of Texas; The Paragould Southeastern Railway Company; Eastern Texas Railroad Company; The Kansas City Southern Railway Company; Texarkana & Fort Smith Railway Company; The Houston, East & West Texas Railway Company; Texas & New Orleans Railroad Company; Louisiana Western Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; Lake Charles & Northern Railroad Company; Vicksburg, Shreveport & Pacific Railway Company; Louisiana & Arkansas Railway Company; Louisiana Railway & Navigation Company; Gulf, Colorado & Santa Fe Railway Company; The Texas & Gulf Railway

Company; Missouri & North Arkansas Railroad Company; Illinois Central Railroad Company; Southern Railway Company; Northern Alabama Railway Company, New Orleans Great Northern Railroad Company, and Mobile & Ohio Railroad Company be, and they are hereby, notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above named parties to the record in respect of any such above described service" and the same is hereby vacated and set aside as to the petitioners herein.

By the Court.

MARTIN A. KNAPP,
Presiding Judge.

November 28, 1913.

332 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA Long Leaf Lumber Company, Petitioners; Railroad Commission of Louisiana, Intervener,

v.

UNITED STATES OF AMERICA, Respondent; INTERSTATE COMMERCE Commission, Atchison, Topeka & Santa Fe Railway Company, and Gulf, Colorado & Santa Fe Railway Company, Intervening Respondents.

Petition for Appeal.

(Filed November 29, 1913.)

The United States, respondent, and the Interstate Commerce Commission, intervener, feeling themselves aggrieved by the final decree entered in the above-entitled cause on November 28, 1913, by their counsel, pray an appeal to the Supreme Court of the United States from the said final decree.

The particulars wherein the United States and the Interstate Commerce Commission consider said final decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And the United States, respondent, and the Interstate Commerce Commission, intervener, further pray that a transcript of the record, proceedings, and papers on which the said final decree was made and entered, duly authenticated, may be transmitted forthwith to

333 the Supreme Court of the United States.

Washington, November 29, 1913.

J. C. McREYNOLDS,
Attorney General of the United States.
CHAS. W. NEEDHAM,

Solicitor for the Interstate Commerce Commission.

Allowed:

MARTIN A. KNAPP,
Presiding Judge United States Commerce Court.

334 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al., Petitioner,
vs.
THE UNITED STATES OF AMERICA et al., Respondents.

Assignment of Errors.

(Filed November 29, 1913.)

Come now the United States of America, by its Attorney General, and the Interstate Commerce Commission, by its Solicitor, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court, entered against them on November 28, 1913, in the above-entitled cause.

The Commerce Court erred—

I.

In not granting the motion to dismiss for want of jurisdiction, and in holding and adjudging that the Commerce Court had jurisdiction to hear and determine the cause.

II.

In holding and adjudging that the order of the Interstate Commerce Commission sought to be annulled and enjoined is an affirmative order within the power of the Court to review, and in not holding and adjudging that the same is a negative order and beyond the power of the court to review.

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III.

In not dismissing the petition for the (a) same does not set forth any cause of action, and is insufficient to warrant the relief granted, or to form the basis for any relief from the order of the commission; (b) nor have the said petitioners shown that there is any equity in the said petition upon which to grant the relief prayed, or to form the basis for any relief from the order of the commission; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners protected by the Constitution of the United States, or any other right of the said petitioners over which this court may exercise jurisdiction.

IV.

In holding and adjudging that with relation to the freight of its proprietary lumber companies the Victoria, Fisher & Western Railroad Company is a common carrier by railroad engaged in commerce among the several states and subject to the act to regulate commerce, approved February 4, 1887, and the various acts amendatory thereof or supplementary thereto.

V.

In holding that the Commission "impliedly, if not expressly, held" that the petitioner was a common carrier, and therefore entitled to a division out of main line lumber rates for services which it performed for its proprietary lumber company.

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VI.

In holding that a mere switching movement could be made a part of a through route instead of holding that the switching movement was an independent movement additional to the line haul.

VII.

In holding that the Commission was without power to inquire into and go behind the mere forms of organization and methods of doing business by the lumber company and the tap line, and ascertain the true facts regarding the relations between the two companies; and whether the tap line was used as a medium for securing rebates on the lumber company's traffic.

VIII.

In holding that the Commission, after finding that the tap line was a medium for the payment of rebates on the lumber company's traffic, could not order the main-line carriers to desist from making such payments.

IX.

In not holding and adjudging that the organization of the Victoria, Fisher & Western Railroad Company and the transfer to it by the lumber companies of the railway tracks and equipment was the creation of a device for the purpose of attempting to shift the old open and illegal rebating transactions between the lumber companies, as shippers, and the trunk lines, as carriers, to private transactions between the Victoria, Fisher & Western Railroad Company and the trunk lines, in order to evade the provisions of the act to regulate commerce, and, simultaneously, to maintain the advantages of the parties.

X.

337

In not holding and adjudging that the lumber companies are making the transportation of their enormous traffic a

matter of bargain and sale, and with the power wielded in controlling the routing to compel the trunk lines to make allowances to the Victoria, Fisher & Western Railroad Company, resulting in undue and illegal preferences and discriminations forbidden by the act to regulate commerce in favor of the lumber companies and against other shippers.

XI.

In not holding and adjudging upon the facts found by the commission that the transportation of the products of the proprietary companies by the petitioner is not transportation by a common carrier.

XII.

In not holding and adjudging that the conclusions and orders of the commission are founded upon substantial evidence and are not arbitrary, and in holding and adjudging that certain parts of the order of the commission are arbitrary, null, and void as to the petitioners.

XIII.

In vacating and setting aside as to the petitioners the portions of the amended order of the Interstate Commerce Commission made October 30, 1912 which declared the tracks and equipment of the petitioners to be plant facilities, and the service rendered thereon to be a plant service, and directing the trunk line carriers to cease and desist from making any allowances to the petitioners in respect to any such plant service.

XIV.

In holding and adjudging that a common carrier may, as
338 to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, and at the same time holding and adjudging that the actual service rendered by the tap-line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and non-proprietary mills, and as this is held by the Interstate Commerce Commission to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

XV.

In disposing of the four separate and distinct cases in a single blanket opinion of general observations, without regard to the peculiar facts of each particular case, after holding that the orders of the commission are separate and distinct as to each of the tap-lines, and are expressly based upon a careful investigation of and separate findings in relation to each of the companies.

XVI.

In granting the relief prayed by the petitioners, or a substantial part thereof.

Wherefore the United States and the Interstate Commerce Commission pray that the said final decree of the Commerce Court, entered November 28, 1913, be reversed, annulled and set aside, and for such other and further order as may be appropriate.

J. C. McREYNOLDS,
Attorney General of the United States,
CHAS. W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

339 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA Long Leaf Lumber Company, Petitioners; Railroad Commission of Louisiana, Intervener,

v.

UNITED STATES OF AMERICA, Respondent; INTERSTATE COMMERCE Commission, Atchison, Topeka & Santa Fe Railway Company, and Gulf, Colorado & Santa Fe Railway Company, Intervening Respondents.

Order Allowing Appeal.

(Entered November 29, 1913.)

In the above-entitled cause, the United States and the Interstate Commerce Commission, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of the Commerce Court entered November 28, 1913, and having at the same time made and filed an assignment of errors, and having in all respects conformed to law and the rules of court—

It is ordered and decreed that the said appeal be and the same is hereby, allowed, as prayed, and made returnable thirty days from the date hereof. And the clerk is directed to transmit forthwith a properly authenticated transcript of the records, papers, and proceedings to the Supreme Court of the United States.

November 29, 1913.

MARTIN A. KNAPP,
Presiding Judge, United States Commerce Court.

340 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA Long Leaf Lumber Company, Petitioners; Railroad Commission of Louisiana, Intervener,

v.

UNITED STATES OF AMERICA, Respondent; INTERSTATE COMMERCE Commission, The Atchison, Topeka & Santa Fe Railway Company, and The Gulf, Colorado & Santa Fe Railway Company, Interveners.

Petition for Appeal.

(Filed November 29, 1913.)

The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company, interveners, feeling themselves aggrieved by the final decree entered in the above entitled cause on November 28, 1913, by their counsel pray an appeal to the Supreme Court of the United States, from the said final decree.

The particulars wherein The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company consider said final decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company, intervenors, further pray that a transcript of the record, proceedings, and papers on which the said final decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

Washington, November 29, 1913.

GARDINER LATHROP,

Per E. B.,

EVANS BROWNE,

*Solicitors for The A., T. & S. F. Ry. Co. and
G., C. & S. F. Ry. Co., Interveners.*

Allowed:

MARTIN A. KNAPP,

Presiding Judge United States —.

341 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA Long Leaf Lumber Company, Petitioners; Railroad Commission of Louisiana, Intervener,

v.

UNITED STATES OF AMERICA et al.

Assignment of Errors.

(Filed November 29, 1913.)

Comes now The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company, by their attorneys, and in connection with their petition for appeal file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court, entered against them on November 28, 1913, in the above entitled cause.

The Commerce Court erred—

I.

In not granting the motion to dismiss for want of jurisdiction, and in holding and adjudging that the Commerce Court had jurisdiction to hear and determine the same.

II.

In holding and adjudging that the order of the Interstate Commerce Commission sought to be annulled and enjoined is an affirmative order within the power of the Court to review, and in not holding and adjudging that the same is an negative order and beyond the power of the Court to review.

III.

342 In not dismissing the petition for the reason- that (a) the same does not set forth any cause of action, and is insufficient to warrant the relief granted, or to form the basis for any relief from the order of the Commission; (b) nor have the said petitioners shown that there is any equity in the said petition from which to grant the relief prayed, or to form the basis for any relief from the order of the Commission; (c) nor have the petitioners shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor have the petitioners shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioners pro-

ted by the Constitution of the United States, or any other right of the said petitioners over which this Court may exercise jurisdiction.

IV.

In holding and adjudging that with relation to the freight of its proprietary lumber company, the Victoria, Fisher & Western Railroad Company is a common carrier by railroad engaged in commerce among the several states and subject to the act to regulate commerce, approved February 4, 1887, and the various acts amendatory thereof or supplementary thereto.

V.

In holding that the Commission "impliedly, if not expressly, held" that the petitioner was a common carrier, and therefore entitled to a division out of main line lumber rates for services which it performed for its proprietary lumber company.

VI.

In holding that a mere switching movement could be made a part of a through route instead of holding that the switching movement was an independent movement additional to the line haul.

VII.

In holding that the Commission was without power to inquire into and go behind the mere forms of organization and methods of doing business by the lumber company and the tap line, and ascertain the true facts regarding the relations between the two companies, and whether the tap line was used as a medium for securing rebates on the lumber company's traffic.

VIII.

In holding that the Commission after finding that the tap line was a medium for the payment of rebates on the lumber company's traffic, could not order the main line carriers to desist from making such payments.

IX.

In not holding and adjudging that the organization of the Victoria, Fisher & Western Railroad Company and the transfer to it by the lumber company of the railway tracks and equipment was the creation of a device for the purpose of attempting to shift the old open and illegal rebating transactions between the lumber companies, as shippers, and the trunk lines, as carriers, to private transactions between the Victoria, Fisher & Western Railroad Company and the trunk lines, in order to evade the provisions of the act to regulate commerce, and, simultaneously, to maintain the advantages of the parties.

X.

In not holding and adjudging that the lumber companies are making the transportation of their enormous traffic a matter of bargain and sale, and with the power wielded in controlling the routing, are forcing the trunk lines to make allowances to the
344 Victoria, Fisher & Western Railroad Company, resulting in undue and illegal preferences and discriminations forbidden by the act to regulate commerce in favor of the lumber companies and against other shippers.

XI.

In not holding and adjudging upon the facts found by the Commission that the transportation of the products of the proprietary company by the petitioner is not transportation by a common carrier.

XII.

In not holding and adjudging that the conclusions and orders of the Commission are founded upon substantial evidence and are not arbitrary, and in holding and adjudging that certain parts of the order of the Commission are arbitrary, null, and void, as to the petitioners.

XIII.

In vacating and setting aside as to the petitioners the portions of the amended order of the Interstate Commerce Commission made October 30, 1912, which declared the tracks and equipment of the petitioner to be plant facilities, and the service rendered thereon to be a plant service, and directing the trunk line carriers to cease and desist from making any allowances to the petitioner in respect to any such plant service.

XIV.

In holding and adjudging that a common carrier may, as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, and at the same time holding and adjudging that the actual service rendered by the tap line from the time it takes the logs until it delivers the finished
345 product to the trunk line is the same for proprietary and non-proprietary mills, and as this is held by the Interstate Commerce Commission to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

XV.

In disposing of the four separate and distinct cases in a single blanket opinion, without regard to the peculiar facts of each particular case, after holding that the orders of the Commission are separate and distinct as to each of the tap lines, and are expressly based

upon a careful investigation of and separate findings in relation to each of the companies.

XVI.

In granting the relief prayed by the petitioners, or a substantial part thereof.

Wherefore, The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company pray that the said final decree of the Commerce Court, entered November 28, 1913, be reversed, annulled, and set aside, and for such other and further order as may be appropriate.

GARDINER LATHROP,

Per E. B.,

EVANS BROWNE,

Attorneys for The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company, Interveners.

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In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and THE Louisiana Long Leaf Lumber Company, Petitioners; Railroad Commission of Louisiana, Intervener,

v.

UNITED STATES OF AMERICA et al.

Order Allowing Appeal.

(Entered November 29, 1913.)

In the above entitled cause, The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of the Commerce Court entered November 28, 1913, and having at the same time made and filed an assignment of errors, and have in all respects conformed to law and the rules of Court—

It is ordered and decreed That the said appeal be and the same is hereby allowed, as prayed, and made returnable thirty days from the date hereof. And the Clerk is directed to transmit forthwith a properly authenticated transcript of the records, papers, and, proceedings to the Supreme Court of the United States.

November 29, 1913.

MARTIN A. KNAPP,

Presiding Judge, United States Commerce Court.

347 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY and LOUISIANA
LONG LEAF LUMBER COMPANY, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent; INTERSTATE COMMERCE
Commission, The Atchison, Topeka & Santa Fe Railway Company,
Gulf, Colorado & Santa Fe Railway Company and Railroad
Commission of Louisiana, Intervenors.

Bond on Appeal.

(Filed December 5, 1913.)

Know all men by these presents, That we, The Atchison, Topeka & Santa Fe Railway Company, and the Gulf, Colorado & Santa Fe Railway Company, as principals, and the National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto the Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company, in the sum of Five Hundred Dollars (\$500.00), to be paid to the Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company. We bind ourselves and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals this fifth day of December, A. D. nineteen hundred and thirteen.

348 Whereas, Heretofore, to wit, on the 28th day of November, 1913, in a suit pending in the United States Commerce Court, and numbered 93 on the docket of said Court, wherein the Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company were petitioners, and the United States of America was respondent, and The Atchison, Topeka & Santa Fe Railway Company, Gulf, Colorado & Santa Fe Railway Company, Interstate Commerce Commission and the Railroad Commission of Louisiana were intervenors, an order, judgment and decree was rendered against said respondent and intervenors, and

Whereas, Said The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company have appealed from said order and decree to the Supreme Court off the United States, and have obtained citation directed to the said Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company, citing and admonishing them and each of them to be and appear at a session of the Supreme Court off the United States, to be held at the City of Washington, within thirty days after the allowance of the said appeal.

Now, the condition of the above obligation is such, that if the said The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company shall prosecute said appeal

to effect and shall pay all costs, if they shall fail to make their appeal good, then the above obligation to be void, otherwise to remain in full force and effect.

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THE ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY,
By ALDIS B. BROWNE,
EVANS BROWNE,

Its Attorneys,

GULF, COLORADO & SANTA FE RAIL-
WAY COMPANY,
By ALDIS B. BROWNE,
EVANS BROWNE,

Its Attorneys,

NATIONAL SURETY COMPANY,
[SEAL.] By W. H. RONSAVILLE, *Attorney in Fact.*

The above and foregoing bond approved and ordered filed this 5th day of December, A. D. nineteen hundred and thirteen.

JOHN E. CARLAND, *Judge.*

350 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al.

v.

UNITED STATES OF AMERICA.

Præcipe for Record.

To the Clerk:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, upon the appeal from the final order or decree of the Commerce Court entered November 28, 1913, and include in said transcript the following pleadings, proceedings and papers on file or of record, to wit:

Petition, filed January 14, 1913.

Return of service, filed January 16, 1913.

Answer of the United States, filed January 29, 1913.

Answer of the Interstate Commerce Commission, filed February 8, 1913.

Petition of A. T. & S. F. Ry. Co. et al. to intervene, filed February 10, 1913.

Order granting the same, entered February 10, 1913.

Motion of Railroad Commission of Louisiana to intervene, filed February 10, 1913.

Order granting the same, entered February 10, 1913.

Journal entry as to hearing on motion to dismiss for want of jurisdiction, February 10, 1913.

Order denying motion to dismiss for want of jurisdiction, entered February 24, 1913.

Order designating Judge Carland to hear testimony, entered March 5, 1913.

351 Certified transcript of testimony at hearings in proceeding before Interstate Commerce Commission, I. and S. Docket No. 11, filed March 26, 1913.

Order of the Interstate Commerce Commission, in Docket No. 3400, Sub. 7, I. & S. Docket No. 11-2, entered May 10, 1913.

Certified copies of exhibits in proceeding before Interstate Commerce Commission, I. & S. Docket No. 11, filed May 8, 1913.

Objections to the sufficiency of the petition on final hearing, filed June 2, 1913.

Journal entries as to final hearing, filed June 3, 6, 1913.

Opinion of the Commerce Court.

Final decree of the Commerce Court.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Citation on appeal.

Petition for appeal of A. T. & S. F. Ry. Co. et al.

Assignment of errors, same.

Order allowing appeal, same.

Bond of A. T. & S. F. Ry. Co., G. C. & S. F. Ry. Co.

Citation on appeal, same.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney

General for the United States.

CHAS. W. NEEDHAM,

Solicitor for Interstate Commerce Commission.

GARDNER LATHROP,

Per E. B.,

EVANS BROWNE,

Solicitors for A., T. & S. F. Ry.

Co. and G., C. and S. F. Ry. Co

352 DISTRICT OF COLUMBIA, ss:

Blackburn Esterline, being first duly sworn, on his oath deposes and says, that on Monday, December 15, 1913, he mailed a certified copy of the foregoing praecipe for record to Wylie M. Barrow, Solicitor for Railroad Commission of Louisiana, Baton Rouge, Louisiana, and deposited the same, with a letter of transmittal, in the United States mail at Washington, D. C., and holds the acknowledgment of the said Wylie M. Barrow therefor.

BLACKBURN ESTERLINE.

Subscribed and sworn to before me this twenty-second day of December, A. D., nineteen hundred and thirteen.

[Seal J. H. Mackey, Notary Public, District of Columbia.]

J. H. MACKEY,

Notary Public, District of Columbia.

353 In the United States Commerce Court, June Session, 1913.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY

v.

UNITED STATES OF AMERICA.

Hugh P. Lutz, being duly sworn, deposes and says, that on December 17th, 1913, he served a certified copy of the præcipe for record, filed by the appellants in the above-entitled cause, upon Mr. Luther M. Walter, Solicitor for appellees, by delivering the same, in his absence, at his usual place of business, Room 557, The Rookery, Chicago, Illinois, to Mr. Edward J. Long, who received and accepted the same for him.

HUGH P. LUTZ.

Subscribed and sworn to before me this 17th day of December, A. D. 1913.

[Seal William A. Small, Notary Public, Cook County, Ill.]

WILLIAM A. SMALL,
Notary Public.

354 United States Commerce Court. Filed Nov. 29, 1913. G. F. Snyder, Clerk.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Victoria, Fisher & Western Railroad Company, Louisiana Long Leaf Lumber Company, Railroad Commission of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court, wherein the United States and the Interstate Commerce Commission are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 29th day of November, A. D. 1913.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 2nd day of December A. D. 1913.

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
W. M. BARROW,
Solicitors for Appellees.

355 United States Commerce Court. Filed Nov. 29, 1913. G. F. Snyder, Clerk.

Citation on Appeal.

UNITED STATES OF AMERICA, *vs.*

To Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company and the Railroad Commission of Louisiana:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the Clerk's Office of the United States Commerce Court, wherein The Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado & Santa Fe Railway Company are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 29th day of November, A. D. 1913.

MARTIN A. KNAPP,
Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 2 day of December A. D. 1913.

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
W. M. BARROW,
Solicitors for Appellees.

356

United States Commerce Court.

No. 93.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY, LOUISIANA
LONG LEAF LUMBER COMPANY, Petitioners,

VS.

UNITED STATES OF AMERICA, Respondent; INTERSTATE COMMERCE
Commission, Atchison, Topeka & Santa Fe Railway Company,
Gulf, Colorado & Santa Fe Railway Company, Railroad Commis-
sion of Louisiana, Interveners.

UNITED STATES OF AMERICA, *ss.*:

I, G. F. Snyder, Clerk of the United States Commerce Court, do hereby certify that the foregoing transcript constitutes a complete record of the proceedings had and papers filed in the above entitled cause, made in accordance with the precept filed in the Clerk's Office of Said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States Commerce Court this 27th day of December, A. D. 1913.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

357 In the Supreme Court of the United States, October Term,
1913.

No. 835.

UNITED STATES OF AMERICA et al., Appellant,

v.

VICTORIA, FISHER & WESTERN R. R. Co. et al.

Statement of Errors.

To the Clerk:

In pursuance of Paragraph 9, Rule 10, Rules of the Supreme Court, the United States, appellant, states that it intends to rely on each and all of the errors assigned.

JNO. W. DAVIS,
Solicitor General.

DISTRICT OF COLUMBIA, *ss.*:

Blackburn Esterline, being duly sworn, deposes and says, that on Tuesday, January 20, 1914, he sent a true copy of the foregoing statement to each of the following named persons: Luther M. Walter, Esq., The Rookery, Chicago, Ill. and Hon. Wylie M. Barrow, Assistant Attorney General of Louisiana, Baton Rouge.

La., Counsel for the Appellees, by depositing the same in the post office at Washington, D. C., in envelopes addressed to each of them.

BLACKBURN ESTERLINE.

Subscribed and sworn to before me this 20th day of January, 1914.

[Seal J. H. Mackey, Notary Public, District of Columbia.]

J. H. MACKEY,
Notary Public, D. C.

I concur in the above designations.

CHAS. W. NEEDHAM,
Solicitor for Interstate Commerce Commission, Appellant.

358 In the Supreme Court of the United States, October Term, 1913.

No. 835.

UNITED STATES OF AMERICA et al., Appellant.,

v.

VICTORIA, FISHER & WESTERN RAILROAD CO. et al.

Instructions to Omit Certain Matter from the Printing.

To the Clerk:

In printing the separate record in the foregoing appeal, you will please omit the following, viz:

1. The Report and Supplemental Report, and the Order and the Amended Order of the Interstate Commerce Commission.

2. Certified transcript of testimony at hearings in proceedings before the Interstate Commerce Commission, I. & S. Docket No. 11, filed March 26, 1913, consisting of 4 printed volumes marked, respectively, Volumes I, II, III, IV, and the certificates of Secretary McGinty, attached thereto.

3. Order of Interstate Commerce Commission in Docket No. 3400, Sub. 7, I. & S. Docket No. 11-A, filed May 10, 1913.

4. Certified copies of exhibits in proceedings before the Interstate Commerce Commission, I. & S. Docket No. 11, filed May 8, 1913, consisting of 1 printed volume marked, Volume V.

359 5. Opinion of the United States Commerce Court.

Other instructions are separately given to print in a single volume certain parts of the matter so to be omitted.

JNO. W. DAVIS,
Solicitor General.

360 [Endorsed:] File No. 23,986. Supreme Court U. S., October term, 1913. Term No. 835. The United States et al., Appellants, vs. Victoria, Fisher & Western Railroad Company et al.

Statement of The United States as to errors intended to be relied on and instructions to omit certain parts of the record in printing. Filed January 21, 1914.

Endorsed on cover: File No. 23,986. U. S. Commerce Court. Term No. 835. The United States and Interstate Commerce Commission, appellants, vs. Victoria, Fisher & Western Railroad Company, Louisiana Long Leaf Lumber Company and Railroad Commission of Louisiana. File No. 23,987. Term No. 836. The Atchison, Topeka & Santa Fe Railway Company and Gulf, Colorado & Santa Fe Railway Company, appellants, vs. Victoria, Fisher & Western Railroad Company et al. Filed December 29th, 1913. File Nos. 23,986 and 23,987.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 887.

THE UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, APPELLANTS,

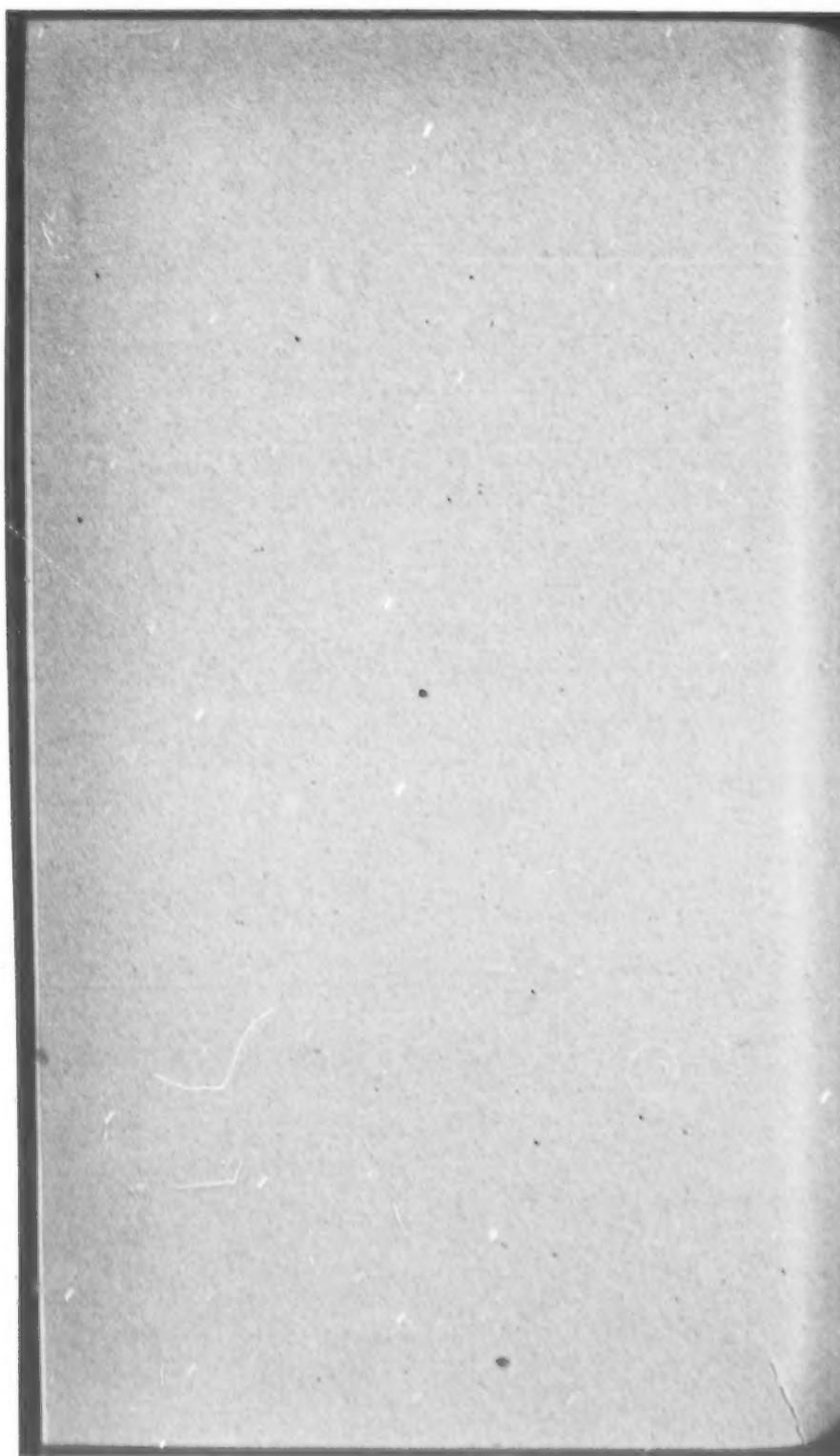
VS.

BUTLER COUNTY RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

FILED DECEMBER 29, 1913.

(28988)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 837.

THE UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, APPELLANTS.

vs.

BUTLER COUNTY RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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tract, or agreement with parties owning the same; and at present petitioner serves a large farming and lumber territory, and along its lines new industries, villages, and towns have sprung up, and petitioner's road as a means of transportation and communication, has become and is now a public necessity, upon which the persons living and doing business along its line necessarily rely and depend. Petitioner further shows that its accounts are kept in the manner prescribed by the act to regulate commerce, and all of the annual and monthly reports required by the Interstate Commerce Commission and the act to regulate commerce have been made from time to time, and that it has complied with all the regulations required by act of Congress concerning the filing of its tariffs and concurrences in joint tariffs with other carriers, and petitioner has also complied with the act of Congress known as the safety appliance act, at considerable expense, and operates trains on regular schedules for the carriage of passengers and property over its lines, and has been and is now engaged in the transportation of mails of the United States under contract with the Post Office Department of the Government.

Petitioner shows that prior to the proceeding hereinafter referred to before the Interstate Commerce Commission it was a party to joint tariffs over through routes on lumber and forest products shipped from points on its line through the Mississippi River
4 and other gateways to points in the States of the United States outside of the State of Missouri, and that it has a physical connection with the lines of the St. Louis & San Francisco Railroad Company and the Missouri Pacific Railway Company at Poplar Bluff, Missouri, and also at Lowell Junction, Missouri, with the line of the Missouri Pacific Railway Company, and prior to the proceeding hereinafter referred to before the Interstate Commerce Commission through routes and joint rates were in effect under tariffs properly filed, covering transportation of the above and other commodity and class freight over petitioner's line and the lines of the Missouri Pacific Railway Company and the St. Louis & San Francisco Railroad Company and their connections to points in the United States outside of the State of Missouri.

Third. Petitioner shows that on a complaint filed before the Interstate Commerce Commission, in the case of Star Grain & Lumber Company, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al., decided December 7, 1909, 17 I. C. C. Rep. 338, the Interstate Commerce Commission used in its opinion such expressions, as to the joint rates and through routes of short line railroads with long line carriers, as alarmed the Missouri Pacific Railway Company and the St. Louis & San Francisco Railroad Company, and as a result thereof they threatened to cancel the through routes and joint rates with petitioner, and the division of such rates, on lumber and forest products, and as a result thereof petitioner filed three complaints before the Interstate Commerce Commission; first, against the Missouri Pacific Railway Company, et al.; second, against the St. Louis

& San Francisco Railroad Company, et al.; third, against F. A. Leland, agent, and Alabama & Vicksburg Railway Company, et al.; in which petitioner prayed that the commission might suspend the operation of certain tariffs and notices which were filed by the defendants in the three proceedings above mentioned, cancelling the joint tariffs then in effect with petitioner, on lumber and forest products, which had been filed and established by the defendants above mentioned; and also praying that the commission might find that the through routes and joint rates, and the divisions thereof then in effect, were just, fair and reasonable, and might require the observance thereof by proper order.

Upon the three petitions aforesaid a hearing was duly had by the commission at New Orleans, Louisiana, in connection with the investigation which the commission had inaugurated, known as the Tap Line Case, I. & S. Docket No. 11, and at such hearing evidence was introduced by the Butler County Railroad Company which fully sets forth its entire character and situation, and its relation to shippers upon its line and to the carriers with which it connects.

It appeared at the hearing of said cause that the authorized capital stock of the Butler County Railroad Company was \$200,000, and that there had been issued thereof \$163,500, which was held by trustees for the Brooklyn Cooperage Company, which company was engaged in lumbering the forests tributary to the line of the Butler County Railroad Company, for timber suitable for cooperage, and manufacturing the same into cooperage stock. There further appeared in detail, the industries which were located along the line of the Butler County Railroad Company, and that there were other persons engaged in lumbering and manufacturing the lumber on the line of petitioner's road in whose business the Brooklyn Cooperage

Company had no interest, and who had no interest in the Butler County Railroad Company or the Brooklyn Cooperage Company. A copy of all of the evidence in said proceeding as to the Butler County Railroad Company is herewith filed as Exhibit A, as a part of this petition.

It further appeared in such proceeding that the Brooklyn Cooperage Company's mill for the manufacture of cooperage, is located at Poplar Bluff, on the line of the Butler County Railroad, and about a mile from the junction point between the Butler County Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company, which road is a part of the system of the Missouri Pacific Railway Company, and about a quarter of a mile from the junction of the Butler County Railroad Company and the St. Louis & San Francisco Railroad Company; that through routes and joint rates were established on lumber and forest products from points on the Butler County Railroad, in connection with the Missouri Pacific Railway Company and the St. Louis & San Francisco Railroad Company, and connections, to points in the United States other than in the State of Missouri, and that the tariffs covering such rates provided for a milling in transit privilege to all mills located on

the line of the Butler County Railroad, and that the joint through rates were divided between the Butler County Railroad and its connections upon terms satisfactory to them and fair and reasonable, so far as all other persons were concerned. Under the milling in transit privilege, above referred to, the rates were available to all shippers of logs over the line of the Butler County Railroad, and which logs were manufactured into lumber and cooperage stock at all mills on the line of said road, the product whereof was then transported through to the markets of destination.

7 After the investigation by the commission aforesaid, it made its report on the 23rd of April, 1912 (23 I. C. C. Rep. 277), and its supplemental report on May 14, 1912 (23 I. C. C. Rep. 549), in which said supplemental report, at page 628, is set forth the report of the commission as to the Butler County Railroad Company, and wherein it practically holds that the Butler County Railroad Company is a common carrier subject to the act to regulate commerce, except in so far as it is engaged in the transportation of traffic for the Brooklyn Cooperage Company, and the exception is made as to this company's traffic for the sole reason that the stock of petitioner is held by trustees for its benefit, and the concluding paragraph of said report, as to the Butler County Railroad Company, is as follows:

"For its service in moving the products of the Cooperage Company's mill to the Iron Mountain and to the Frisco, a distance of less than one mile, this tap line may lawfully receive out of the rate, nothing beyond a reasonable switching charge, which we fix at \$1.50 per car."

Following the supplemental report aforesaid, and on the 14th day of May, 1912, the Interstate Commerce Commission entered its order, wherein the connecting carriers of the Butler County Railroad Company were authorized on not less than three days' notice, "to reopen through routes and publish joint rates" with the Butler County Railroad Company, "provided the allowances or divisions of such joint rates to be paid on the products of the mills of the said proprietary companies, shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission;" and thereafter, on the 30th day of October, 1912, the

8 Interstate Commerce Commission entered its amended order, wherein, so far as the Butler County Railroad Company is concerned, it was ordered as follows:

"Seven. It is ordered that the said principal defendants (Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company) above named, be and they are hereby required, on or before January 1st, 1913, to re-establish, and for a period of two years to maintain with each of the said parties to the record last above named (Butler County Railroad Company), the through interstate routes and joint rates in effect in accordance with their respective tariffs filed with this commission on April 20th, 1912.

"Eight. Provided, that the rates on yellow pine lumber and articles taking the same rates from points on the lines of the last above named parties to the record (Butler County Railroad Company) shall not exceed the current rates in effect from the junction points; and

"Nine. Provided further, that the allowances or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said last named parties to the record (Butler County Railroad Company) on the products of the mills of the said respective proprietary companies named in said report shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission, which are hereby fixed as maximum divisions or allowances thereon until further order, the commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations, and are unlawful."

Copies of such original and amended orders are herewith filed and are asked to be taken as a part of this petition, as Exhibits B and C.

Fourth. The result of such amended order is that the through
9 routes and joint rates in effect and established by the Butler County Railroad Company with its connections, the Missouri Pacific Railway Company and the St. Louis & San Francisco Railroad Company, and other carrier companies, on lumber and forest products were approved and the connecting carriers of petitioner were ordered to re-establish the same and for a period of two years to maintain such through routes and joint rates, and the milling in transit privileges under such tariff were practically approved by the commission under its amended order, except that logs shipped over the Butler County Railroad, destined to points on the Missouri Pacific Railway and the St. Louis & San Francisco Railroad, and their connections, and which were transported for the Brooklyn Cooperage Company, should not have the benefit of the milling in transit privilege above referred to, but that on the joint rate over the through route, so far as the traffic of the Brooklyn Cooperage Company was concerned, the Butler County Railroad Company could only receive as its proportion of said joint rate a switching charge of \$1.50 per car from the mill to the connection with the long line carriers, and the commission finds in its amended order aforesaid that "any allowances or divisions in excess" of \$1.50 per car "result in undue preferences and unjust discriminations, and are unlawful," and the Missouri Pacific Railway Company and the St. Louis & San Francisco Railroad Company are ordered by the commission not to make any divisions of the joint rates to the Butler County Railroad Company other than the \$1.50 per car on the traffic of the Brooklyn Cooperage Company aforesaid.

Petitioner charges that there was absolutely no evidence whatever before the commission which justified a conclusion that the joint

10 rates and divisions thereof, including the milling in transit privilege above referred to, operated to give any undue preference to the Brooklyn Cooperage Company, or anyone else, or to create any unjust discrimination against shippers on the line of the Butler County Railroad Company, other than the Brooklyn Cooperage Company, and it will be seen by reference to the entire evidence filed herewith, so far as it refers to the Butler County Railroad Company or the territory served by it, that there was no evidence before the commission upon which to base the conclusion reached by it.

Fifth. In making the order of May 14th, 1912, and the amended order of October 30th, 1912, petitioner charges that the Interstate Commerce Commission acted without jurisdiction and beyond the powers conferred upon it, in that there was before the commission no substantial evidence to sustain said orders, and the orders were entered without any evidence to warrant the conclusion reached by the commission or the reasons assigned by it for its conclusion, so far as the traffic of the Brooklyn Cooperage Company is concerned, and the commission acted arbitrarily and unjustly in entering said order as to the amount to be received by petitioner from traffic of the Brooklyn Cooperage Company, and the conclusion of the commission was contrary to the evidence. Petitioner further charges that the making of said order, and the enforcement thereof, as to the traffic carried for the Brooklyn Cooperage Company, is a taking and depriving of petitioner of its property without due process of law, in violation of Article V of the amendments to the Constitution of the United States, and further constituted a taking of the property of petitioner for public use without just compensation, and the effect of said order is to require petitioner to serve the public for an entirely inadequate compensation.

11 Petitioner further shows that the order and amended order of the commission aforesaid, if carried out by petitioner and its connections, will require it and them to create unjust discrimination as between shippers upon its line, as illustrated as follows:

If the shipment is from the mill of a shipper other than the Brooklyn Cooperage Company on the line of the Butler County Railroad Company, upon which the rate is ten cents per 100 pounds on lumber or cooperage stock, the division of said rate to which the Butler County Railroad Company is entitled would be three cents per 100 pounds. If, on the other hand, the shipment was made by the Brooklyn Cooperage Company from a mill located in the same locality, under the order and amended order of the commission aforesaid, the Butler County Railroad Company would receive only \$1.50 per car for its service, and therefore in order to compensate the Butler County Railroad Company it would have to add sufficient over and above the \$1.50 per car to the shipment made by the Brooklyn Cooperage Company in order that petitioner might receive for its services three cents per 100 pounds, and therefore the Brooklyn

Cooperage Company would be required to pay three cents more than the other shipper in the same locality, less \$1.50 per car.

The order and amended order of the commission is based entirely upon the fact that the stock of the Butler County Railroad Company is held by trustees for the benefit of the Brooklyn Cooperage Company. Upon this stock the Brooklyn Cooperage Company has never received a cent in return, the only dividend thereon being once paid from borrowed money, and there was no evidence in the record, and none could be produced, tending to show that the 12 tariffs in effect, and which the commission has ordered to be reestablished, except in so far as the traffic of the Brooklyn Cooperage Company is concerned, in any way discriminated against shippers other than the Brooklyn Cooperage Company, or created any preference in favor of that company, but on the contrary, if the order and amended order of the commission are allowed to go into effect, it will be necessary that the charges for like service to the Brooklyn Cooperage Company shall be greater than the charges to other shippers on the line of the Butler County Railroad, and this is made necessary by the order and amended order of the commission aforesaid, or otherwise it is impossible for the Butler County Railroad Company to get sufficient revenue from its traffic to enable it to conduct the same.

Your petitioner is advised and believes that unless prevented from doing so by order of this honorable court the connecting carriers of petitioner aforesaid will decline to allow to petitioner its fair division of the joint rates to be established under the order of the commission aforesaid, and that unless such carriers decline to allow to petitioner its fair proportion of said joint rates the Interstate Commerce Commission will proceed to enforce the unlawful provision in its order as to the division of the joint rates to be allowed to petitioner.

In consideration whereof and for as much as petitioner is remediless in the premises save in a court of equity, where it may obtain relief to which it is entitled, your petitioner now prays that this court may:

First. Grant a preliminary writ of injunction suspending the order and amended order of the commission, in so far only as it forbids a division out of the joint rates to be reestablished on January 13 1st, 1913, to petitioner greater than \$1.50 per car, but that the division of said joint rates to be reestablished as aforesaid may continue as heretofore agreed upon by petitioner and its connections aforesaid, and that this preliminary writ of injunction may continue, pending the final hearing and determination of this suit.

Second. That it be adjudged, ordered, and decreed that the order of the commission and the amended order aforesaid, in so far as they forbid a division out of said joint rates to petitioner greater than \$1.50 per car, as aforesaid, be forever enjoined, set aside, annulled, and suspended, and that the said United States of America

and the commission and their representatives, officers, agents, and servants be forever enjoined from enforcing or taking any steps to enforce the order or amended order aforesaid, in so far as it limits the division of said joint rates to which petitioner is entitled to \$1.50 per car aforesaid.

Third. That your honors may grant to your petitioner process of subpoena to the respondent, requiring it to duly appear and answer the allegations of this petition, answer under oath, however, being expressly waived.

Fourth. The petitioner prays for such other, further, and general relief as in equity and good conscience is meet and proper.

And it will ever pray, etc.

BUTLER COUNTY RAILROAD COMPANY,
By (Sgd.) WM. N. BARRON.

JAMES M. BECK,
WM. A. GLASGOW, Jr.,
Counsel for Petitioner.

14 STATE OF MISSOURI,
County of Butler, ss:

WILLIAM N. BARRON, being duly sworn, says that he is the vice president and general manager of the Butler County Railroad Company, the petitioner in the above cause; that he has read the foregoing petition and knows the contents thereof; and that the statements therein are true to the best of deponent's knowledge and belief.

(Sgd.) WM. N. BARRON.

Subscribed and sworn to before me this twenty-first day of December, A. D. 1912.

(Sgd.) SOPHIA A. REID,
Notary Public.

[SEAL]

My commission expires June 14, 1915.

15 *Exhibit A.*

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Trackage agreements.....	4, 5, 6, 7, 43, 44, 46
Tracks.....	31, 46, 47
Traffic increase (outside business).....	38, 39
Traffic total.....	46
Trains.....	6, 46
Train schedules.....	7

18 STENOGRAPHER'S MINUTES.

Before the Interstate Commerce Commission. Docket No. 11 (I. & S.).

Investigation and suspension of schedule cancelled through rates with certain tap-line connections.

At New Orleans, La., December 8, 1910.

All of evidence as to Butler County Railroad Company.

Commissioner HARLAN. The Butler County Railroad Company is the next company. Mr. Glasgow, are you ready?

Mr. GLASGOW. Yes, sir.

Commissioner HARLAN. How many witnesses have you?

Mr. GLASGOW. One.

19 WILLIAM N. BARRON was called as a witness, and, having been duly sworn, testified as follows:

Mr. GLASGOW. I want to make a brief statement of our case. In this case there are three petitions filed by the Butler County Railroad Company. They were original petitions filed, and then by permission of the commission they were filed in this cause as petitions to be considered under the Star Grain case. One is the Butler County Railroad Company against the Missouri Pacific Railway Company and the Iron Mountain; the second is the Butler County Railroad Company against the St. Louis & San Francisco Railroad Company and others; and the third is the Butler County Railroad Company against F. A. Leland, agent, and the Alabama & Vicksburg Railway Company.

The petition sets forth the tariffs which were in effect at this time on the several routes set up in the petition by the several defendants,

and their connections, and that tariffs had been filed by each of the defendants with the concurrences cancelling those rates and putting in effect other rates from the junction point with the Butler County Railroad at Poplar Bluff.

The petition has two charges: First, that the rates established under the cancelling tariffs or proposed to be established under those cancelling tariffs, which are increases over and above the rates now in effect, are unjust and unreasonable. Second, that the Butler County Railroad Company is a common carrier and entitled to joint rates and through routes with the long-line carriers, and that the joint rates and through routes in effect before the cancellation notices were just and reasonable, and asking the commission to reestablish them, or require that those rates be reestablished or continued with divisions to the several roads parties thereto.

20

Direct-examination.

Mr. GLASGOW. Where do you live, Mr. Barron?

Mr. BARRON. Poplar Bluff, Missouri.

Mr. GLASGOW. You have a map here of the Butler County Railroad Company?

Mr. BARRON. I am the vice president, treasurer and general manager of the Butler County Railroad Company.

Mr. GLASGOW. You have charge of its operation?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. When was the Butler County Railroad Company organized?

Mr. BARRON. It was organized under the railroad statute of Missouri in September, 1905.

Mr. GLASGOW. Prior to that time, what company or person owned the railroad which the Butler County Railroad Company now owns?

Mr. BARRON. That which was in existence at that time was owned by the Brooklyn Cooperage Company.

Mr. GLASGOW. The Brooklyn Cooperage Company is a lumber company?

Mr. BARRON. It is a cooperage company.

Mr. GLASGOW. Engaged in making cooperage stock?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And it has a mill on the line of the Butler County Railroad?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. At what point?

Mr. BARRON. At a point in the neighborhood of Poplar Bluff called Linstead.

Mr. GLASGOW. At the time that the Butler County Railroad Company was incorporated, were there any allowances made by
21 the carriers with which it connected physically to the Brooklyn Cooperage Company on cooperage stock or lumber or anything else?

Mr. BARRON. No, sir.

Mr. GLASGOW. What roads does the Butler County Railroad Company connect with?

Mr. BARRON. It connects with the St. Louis, Iron Mountain & Southern Railroad, and also with the St. Louis and San Francisco Railroad.

Mr. GLASGOW. At what point?

Mr. BARRON. Well, it is variously known as Linstead and Poplar Bluff; it is in the neighborhood of Poplar Bluff.

Mr. GLASGOW. You have a map here of the Butler County Railroad?

Mr. BARRON. Yes, sir.

(Paper produced.)

Mr. GLASGOW. Beginning at Poplar Bluff, at the connection between the Butler County Railroad and the St. Louis & San Francisco Railroad, there are tracks, a red dotted line. To whom do those tracks belong?

Mr. BARRON. The red line indicates tracks which the Butler County Railroad Company owns.

Mr. GLASGOW. And the black line with white in between?

Mr. BARRON. Indicates tracks owned by other concerns, over which the Butler County Railroad Company operates its trains.

Mr. GLASGOW. And the yellow?

Mr. BARRON. Indicates tracks which are owned by the Brooklyn Cooperage Company.

Mr. GLASGOW. Now, beginning at Poplar Bluff, to what point does the Butler County Railroad Company operate its trains over its own tracks and tracks over which it has the running right?

22 Mr. BARRON. From Poplar Bluff it operates its trains over its own tracks to the junction with the St. Louis, Iron Mountain and Southern at Linstead; then over the track of the St. Louis, Iron Mountain and Southern Railway Company, Cairo Branch, to Lowell Junction.

Mr. GLASGOW. What distance?

Mr. BARRON. About seven and a half miles.

Mr. GLASGOW. That is by arrangement or agreement for trackage payments by the Butler County Railroad?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And thence to where?

Mr. BARRON. It operates over its own track; that is, over the Butler County Railroad Company's own track south, a distance of seven miles.

Mr. GLASGOW. To what point?

Mr. BARRON. To a point called Bailey's; thence over the track that is owned by the Brooklyn Cooperage Company to a point called Melville.

Mr. GLASGOW. Is that under an agreement or lease?

Mr. BARRON. That is under an agreement by which the Butler County Railroad Company operates and has trackage rights on that

track. Thence it operates northwardly to a point called Menorkenut on a track also owned by the Brooklyn Cooperage Company, over which it has trackage rights.

Mr. GLASGOW. At that point is where the tracks of the Brooklyn Cooperage Company operated by it connect with the Butler County Railroad Company?

Mr. BARRON. That is one of the points where it connects with the Brooklyn Cooperage Company logging tracks.

23 Mr. GLASGOW. Beginning at Linstead and going over the St. Louis & San Francisco tracks to Lowell Junction—

Mr. BARRON. That is the Iron Mountain track.

Mr. GLASGOW. I should say the Iron Mountain track, to Lowell Junction, what is the arrangement under which you operate trains over that track?

Mr. BARRON. The arrangement is that the Butler County Railroad Company operates its trains subject to the orders of the train despatcher of the Iron Mountain Railroad, and for the service and the use of the track it pays the Iron Mountain Railroad Company a certain sum per train-mile, depending upon the size of the train.

Mr. GLASGOW. Well, now, a train of 25 cars?

Mr. BARRON. It pays 65 cents per train-mile.

Mr. GLASGOW. And 35 cars?

Mr. BARRON. 75 cents.

Mr. GLASGOW. And 45 cars or more?

Mr. BARRON. 85 cents.

Mr. GLASGOW. Can you tell us about what per annum that rental amounts to which is paid to the Iron Mountain road?

Mr. BARRON. That amounts to about \$3,600 per annum.

Mr. GLASGOW. Beginning at Poplar Bluff. Have you got a station there?

Mr. BARRON. We have a station in the neighborhood of Poplar Bluff; it is about a mile distant from the center of the town; it may be said to be in Poplar Bluff.

Mr. GLASGOW. Do you have an agent?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Have you an agent at Lowell Junction?

24 Mr. BARRON. We have a joint agent with the Iron Mountain Railroad there, and we pay the entire compensation of that agent.

Mr. GLASGOW. You pay it?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Have you a station man or agent at Bailey's?

Mr. BARRON. No.

Mr. GLASGOW. Have you at Melville?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. An agent and station man?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. For the delivery of freight or travel which may pass along?

Mr. BARRON. Both.

Mr. GLASGOW. Do you run regular trains over the Butler County Railroad, on schedule?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Have you got a copy of the schedule of your company there?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. The time table No. 4?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. I want to file this as an exhibit.

(The paper so offered and identified was received in evidence and thereupon marked, Butler County Railroad Exhibit No. 1, witness Barron, received in evidence December 9, 1910, and is attached hereto.)

Mr. GLASGOW. Those trains shown on that schedule are operated upon regular time tables for the carriage of passengers and freight?

Mr. BARRON. Yes, sir; every day except Sunday.

Mr. GLASGOW. Do you sell passenger tickets on that road?

Mr. BARRON. Yes, sir.

25 Mr. GLASGOW. At what points?

Mr. BARRON. At Poplar Bluff, Lowell Junction, Melville, and wherever there is an agent. The remainder of the business is done on a cash fare basis by the men in charge of the train.

Commissioner HARLAN. What is the total mileage operated by your road?

Mr. BARRON. About 35 miles, 34.

Mr. GLASGOW. What is the part of that of which the Butler County Railroad now owns the track?

Mr. BARRON. Twelve miles.

Mr. GLASGOW. And have you any track arrangement looking to the immediate acquisition of additional tracks?

Mr. BARRON. Yes, sir; just as soon as the deed can be drawn, the Butler County Railroad will acquire by purchase from the Brooklyn Cooperage Company, the present owner, that piece of track lying between Bailey's and the southern terminus of the road, including three miles that is now under construction down there, to the south line of section 13.

Mr. GLASGOW. And has the price been agreed upon?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. When the Butler County Railroad was organized, I suppose, following the usual way, the cooperage company sold to that company the tracks which it then had, and—

Mr. BARRON. Part of them.

Mr. GLASGOW. Part of them, and issued stock in consideration thereof?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And that stock is held by the Brooklyn Cooperage Company?

26 Mr. BARRON. It is held, Mr. Glasgow, by certain individuals in trust for the Brooklyn Cooperage Company.

Commissioner HARLAN. What is the amount of the capital stock issued?

Mr. BARRON. \$163,500.

Commissioner HARLAN. And authorized?

Mr. BARRON. \$200,000.

Commissioner HARLAN. All of it is held in trust for the Brooklyn Cooperage Company?

Mr. BARRON. I believe so; yes, sir.

Mr. GLASGOW. Has it any bonded indebtedness?

Mr. BARRON. It has a bonded indebtedness of \$50,000.

Mr. GLASGOW. Those bonds are probably held in the same way?

Mr. BARRON. I believe they are; yes, sir.

Commissioner HARLAN. Held by whom?

Mr. BARRON. I believe they are held—the paper is made payable to the Brooklyn Cooperage Company.

Mr. GLASGOW. The bonds you mean, or the note?

Mr. BARRON. The note, and the mortgage securing the note.

Mr. GLASGOW. Will you tell us, when the operations were commenced, and these roads were being built, were there any towns or villages or farms along the route this road now goes?

Mr. BARRON. There were no towns or villages; there were a very few farms, but none in comparison with what exist there now.

Mr. GLASGOW. The Great Western Land Company is a company owning large tracts of lumber and timber lands?

Mr. BARRON. Yes, sir; I have a map here which shows the situation about that. (Producing map.)

27 Mr. GLASGOW. The yellow on this map shows the land of the Great Western Land Company, does it?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Now, as the progress of cutting timber on the lands of this company proceeded, the white indicates the lands from which it has been cut off, does it?

Mr. BARRON. No, sir; not altogether; that is hardly correct.

Mr. GLASGOW. Well—

Mr. BARRON. The white indicates land that the Great Western Land Company does not own; and you will notice that there is a great deal more white on the map where the railroad has been in operation for some years than there is farther down; it never was an absolutely solid body, but it was about alike; but up on the northern portion, where the railroad has existed from 11 to 12 years, a great deal of the land has been sold. Whenever it is sold, it is sold to a settler, who puts it, or part of it, immediately into cultivation.

Mr. GLASGOW. That white along there, does that indicate the land that is under cultivation or—

Mr. BARRON. It indicates the land that has been sold and what few farms there were in that neighborhood prior to that time, and that section of the country is very largely in cultivation.

Mr. GLASGOW. Are there farms all along the line of the road from Lowell Junction down to Melville, of course with intervening spaces yet to be settled?

Mr. BARRON. Yes, sir; the Great Western Land Company in that neighborhood has sold three or four hundred separate tracts of land that are now in cultivation, to farmers.

28 Commissioner HARLAN. What is the relation between the Brooklyn Cooperage Company and the Great Western Land Company?

Mr. GLASGOW. I was coming right to that at this moment, if your Honor will permit me. As I understand, the stock of the Brooklyn Cooperage Company is owned by the American Sugar Refining Company?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. The Great Western Land Company's stock is held by whom?

Mr. BARRON. By the American Sugar Refining Company.

Mr. GLASGOW. And that is the only relation which exists between the Great Western Land Company and the Brooklyn Cooperage Company?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. What is the Brooklyn Cooperage Company engaged in doing; what is its principal business?

Mr. BARRON. Its principal business is the manufacturing of sugar barrels with which to ship the sugar refined by the American Sugar Refining Company.

Mr. GLASGOW. What is the character of the timber in that section of country that the Great Western Land Company owns?

Mr. BARRON. It is the same as all of that eastern Texas and eastern Arkansas and southeast Missouri bottom; it is hardwood timber; it consists principally of gum; next in volume will be oak, and after that, hickory, ash, elm, and other timbers of that forest in smaller proportions.

Mr. GLASGOW. Any pine?

Mr. BARRON. Not a pine tree on the outfit.

29 Mr. GLASGOW. Now, beginning at Lowell Junction and coming along, I understand you to say down towards Melville there are farms along the line of the road.

Mr. BARRON. Yes.

Mr. GLASGOW. Have any villages sprung up since the road was started?

Mr. BARRON. Yes, sir; three.

Mr. GLASGOW. What are they?

Mr. BARRON. Batesville, Bailey's, and Melville.

Mr. GLASGOW. What is the population, should you say, of Melville?

Mr. BARRON. Well, Melville will approximate a thousand people.

Mr. GLASGOW. And the others are villages which have grown up?

Mr. BARRON. And the others are smaller.

Mr. GLASGOW. What character of freight is transported by the Butler County Railroad?

Mr. BARRON. You might say pretty much everything that is used by a community.

Mr. GLASGOW. Well, name the principal articles.

Mr. BARRON. Well, the principal is—transported by the Butler County Railroad?

Mr. GLASGOW. Yes, sir.

Mr. BARRON. Do you mean the less than carload, or the general proposition?

Mr. GLASGOW. Well, it is engaged in carload and less than carload transportation?

Mr. BARRON. Yes.

Mr. GLASGOW. Does it carry the class freights?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And has tariffs in effect covering class freights?

Mr. BARRON. Yes, sir; and filed with the Federal Commission.

30 Mr. GLASGOW. With the Interstate Commerce Commission?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And joint tariffs covering the class freight with what roads?

Mr. BARRON. With the St. Louis, Iron Mountain and Southern.

Mr. GLASGOW. When the tariffs were filed cancelling the rates on lumber and lumber products by the Iron Mountain road, were the class freights cancelled out also?

Mr. BARRON. No.

Mr. GLASGOW. And now today the through routes and joint rates are in effect with the Iron Mountain for class freight on your road?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Does any freight move under those tariffs?

Mr. BARRON. A great deal.

Mr. GLASGOW. Have you any arrangement for carrying the mails on this road?

Mr. BARRON. Yes, sir; we are under contract with the Post Office Department to carry the mail.

Mr. GLASGOW. From what point?

Mr. BARRON. From Lowell Junction to Melville. The name of Melville post office is Quelin. The place has two names; the post office is the name of Quelin and the railroad name of Melville.

Mr. GLASGOW. Have you filed joint tariffs with other roads, the Iron Mountain and the 'Frisco roads, with the Interstate Commerce Commission, or concurrences in their through tariffs?

Mr. BARRON. We have filed concurrences with the Interstate
21 Commerce Commission concurring in tariffs issued by the Missouri Pacific and by the 'Frisco Railroad.

Commissioner HARLAN. Where are your lumbering operations going on now?

Mr. BARRON. They are going on on that land of the Great Western Land Company.

Commissioner HARLAN. I assume so, but what part of this land? Take, for instance, the region south of Melville; what are you doing down there?

Mr. BARRON. They are lumbering down there.

Commissioner HARLAN. In what section?

Mr. BARRON. Well, where that yellow line is, you will see on the other map, Judge—

Commissioner HARLAN. Melville, apparently, seems to be in section 31.

Mr. BARRON. 31 and 36, and the lumbering operations are being carried on in the vicinity of these yellow lines here and here and down there (indicating).

Commissioner HARLAN. If you will just answer the question; Melville, you say, is in 31 and 36?

Mr. BARRON. Melville is situated in section 31, township 23 north, range 7 east and—

Commissioner HARLAN. We will just leave out the township and range and shorten it up.

Mr. BARRON. Well, in sections 31 and 36.

Commissioner HARLAN. Is it towards the north of 31 or the south of 31?

Mr. BARRON. It is in the south half of 31 and 36.

Commissioner HARLAN. Well, south of Melville, then, according to this map, the road is owned by the Brooklyn Cooperage Company?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And it is around that road that you are now doing lumbering south of Melville?

32 Mr. BARRON. Yes, sir.

Commissioner HARLAN. That is, the Brooklyn Cooperage Company is doing the lumbering?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And the Butler County Railroad is doing the hauling?

Mr. BARRON. No, sir.

Mr. GLASGOW. I am coming to it—

Commissioner HARLAN. Well, we have come to it now, and I want to know now. Who does the hauling from the forest to Melville?

Mr. BARRON. From that forest, the Brooklyn Cooperage Company.

Commissioner HARLAN. With what equipment?

Mr. BARRON. Its own.

Commissioner HARLAN. How many logging cars has it?

Mr. BARRON. Now, I beg pardon—I said its own equipment—I had the locomotives in my mind.

Commissioner HARLAN. Very well.

Mr. BARRON. The cars belong to the Butler County Railroad.

Commissioner HARLAN. But the locomotives belong to the cooperage company?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. What is the mileage of the constructed track south of Melville?

Mr. BARRON. It is about two and one-half miles.

Commissioner HARLAN. Does it run right into the forest belonging to the Great Western Land Association?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Is there any ownership there?

Mr. BARRON. Yes, there is——

33 Commissioner HARLAN. According to this yellow map, the ownership is very insubstantial, as indicated by the white part of the map.

Mr. BARRON. Well, it is small, compared with the amount of land owned by the Great Western Land Company, but there is a good deal of territory shown on that map, and a good deal of land and timber is owned by other parties.

Mr. GLASGOW. Each of those blocks represents a square mile, does it?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Well, this map with the yellow color on it indicates substantially the ownership as it exists to-day?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. The yellow showing the Great Western Company's ownership and the white the outside ownership?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Now, I observe that south of the station called Hicoria there is a logging road running due east?

Mr. BARRON. Yes.

Commissioner HARLAN. Are you doing any lumbering there?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And that forest also belongs to the Great Western Land Association?

Mr. BARRON. And others.

Commissioner HARLAN. It is indicated on this colored map?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And the logging road belongs to the cooperage company?

Mr. BARRON. Yes, sir.

34 Commissioner HARLAN. Does it use any locomotives that it owns?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. The locomotives it owns there are confined to the logging road?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And is that true of the locomotives used south of Melville?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. They do not go onto the tracks of the Butler County Railroad?

Mr. BARRON. Yes, sir; they do.

Commissioner HARLAN. What do they do on those tracks?

Mr. BARRON. They will run over them.

Commissioner HARLAN. To what point—do you mean regularly?

Mr. BARRON. No; they will run over them and get some timber and deposit it at some switch where the Butler County Railroad will handle it.

Commissioner HARLAN. Just at an interchange point?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And not beyond that?

Mr. BARRON. No.

Commissioner HARLAN. Now, north of Menokenut and also to the east, there is some of this track belonging to the cooperage company?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. And you are doing lumbering in there?

Mr. BARRON. The Brooklyn Cooperage Company and others are doing lumbering in there.

35 Commissioner HARLAN. Well, the Brooklyn Cooperage Company is lumbering the Great Western Land Company's lands?

Mr. BARRON. It and others.

Commissioner HARLAN. What other land—

Mr. BARRON. No; it and other parties are lumbering the Great Western Company's land.

Commissioner HARLAN. But the Brooklyn Cooperage Company is lumbering no lands except those belonging to the association?

Mr. BARRON. Yes, sir; it is.

Commissioner HARLAN. Just tell us about that.

Mr. BARRON. If it buys a tract of timber on another man's land, it lumbers that, and the Great Western Land Company is doing business with other parties who lumber on the Great Western Land Company's land as well as the Brooklyn Cooperage Company. The Brooklyn Cooperage Company take off only one class of timber and other parties remove the remainder and ship it out over that road.

Commissioner HARLAN. At what other part of the Great Western Land Company's holding is the cooperage company lumbering at this time?

Mr. BARRON. I beg pardon?

Commissioner HARLAN. Well, I see that the land association owns some lands up along the Iron Mountain right of way.

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Is the Brooklyn Cooperage Company doing any lumbering there?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. How extensive is the lumbering at that point?

Mr. BARRON. Not very extensive, because that section is pretty well cut over, and very little left.

Commissioner HARLAN. You may proceed.

36 Mr. GLASGOW. I was asking you a moment ago whether the Butler County Railroad Company filed concurrences in the joint tariffs published by the 'Frisco and the Iron Mountain roads, with the Interstate Commerce Commission?

Mr. BARRON. Yes, sir; it did.

Mr. GLASGOW. Will you give us, if you have there, a reference to the index filed with the Interstate Commerce Commission of those tariffs?

Mr. BARRON. Well, Mr. Glasgow—

Commissioner HARLAN. You can file that later.

Mr. BARRON. Mr. Glasgow has it, I believe.

Mr. GLASGOW. I do not believe so.

Commissioner HARLAN. Well, it is filed in our Bureau of Tariffs?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. The last that is filed is I. C. C. No. 5, Butler County Railroad Company, indexes to tariff No. 5?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And that shows the list of tariffs which your company has concurred in, and the company filing the tariff with the Interstate Commerce Commission?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Have you also filed with the Interstate Commerce Commission the tariff of the Butler County Railroad?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And that is filed as I. C. C. No. 1, Butler County Railroad freight tariff of local rates No. 3?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. On classes and commodities?

Mr. BARRON. Yes, sir.

37 Mr. GLASGOW. Has your company complied with the Federal statute as to safety appliances?

Mr. BARRON. Yes, sir; clear down to the ash-pan law.

Mr. GLASGOW. The Butler County Railroad has?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Can you give us approximately what was the cost to your company to comply with that statute of Congress?

Mr. BARRON. Well, I should say about \$6,500.

Mr. GLASGOW. Has your company made the reports to the Interstate Commerce Commission monthly and yearly required by the act to regulate commerce?

Mr. BARRON. Yes, sir; also required by the orders of the commission.

Mr. GLASGOW. Does your company keep its books in accordance with the regulations and orders of the Interstate Commerce Commission?

Mr. BARRON. It does.

Mr. GLASGOW. Will you tell us how many locomotives the Butler County Railroad has?

Mr. BARRON. It has two.

Mr. GLASGOW. How many cars?

Mr. BARRON. Well, it has 110 or 112 or 113, I forget which; not less than 110, however.

Mr. GLASGOW. It has a passenger coach?

Mr. BARRON. Yes, sir; and we just bought another one, making two.

Mr. GLASGOW. Caboose?

Mr. BARRON. About three.

Mr. GLASGOW. Has it any box cars?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Coal cars?

Mr. BARRON. It has six gondolas.

38 Mr. GLASGOW. Does this photograph show a train on the Butler County Railroad made up of the various characters of equipment owned by that road? [Handing photograph.]

Mr. BARRON. Yes, sir.

Mr. GLASGOW. I offer that in evidence.

(The photograph so offered and identified was received in evidence and marked Butler County Railroad Exhibit No. 2, witness Barron, received in evidence December 9, 1910, and is attached hereto.)

Mr. GLASGOW. Does your company, in pursuance of the act of Congress, observe the hours of service provided by the congressional act?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Can you tell us about what population is adjacent to and along the line of road operated by the Butler County Railroad and served by it?

Mr. BARRON. There is a population of not less than 3,500 or 4,000 people—there is more than that; I will say 5,000 people.

Mr. GLASGOW. Farmers?

Mr. BARRON. Farmers and merchants—

Mr. GLASGOW. A general population. I suppose?

Mr. BARRON. General population. Hunters—

Mr. COWAN. Politicians?

Mr. BARRON. Oh, yes; I might say they predominate.

Examiner BURCHMORE. A great number of timber cutters and lumbermen?

Mr. BARRON. Yes, sir; a great number of men working in the timber; tie makers, piling makers; all of those, however, or with very few exceptions, have farms and they devote their time—

Commissioner HARLAN. Never mind going into those details. We understand there is a general population there.

29 Mr. GLASGOW. When the Butler County Railroad receives shipments of lumber to go over its road, or cooperage stuff, whichever it may be or whatever it may be, where is it received by the Butler County Railroad?

Mr. BARRON. Wherever it is tendered to it.

Mr. GLASGOW. At what points on its line, I mean?

Mr. BARRON. Well——

Mr. GLASGOW. At the junction points with these logging roads?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. That is what I mean.

Mr. BARRON. And other places, too; it receives lumber tendered to it for shipment by a private mill at Melville, and it receives lumber tendered to it for shipment by the public at Bailey's and at Batesville.

Mr. GLASGOW. But I mean, does the Butler County Railroad perform any of the service off its own line of bringing the traffic to its line?

Mr. BARRON. No.

Mr. GLASGOW. That is performed, in the case of the cooperage company by the engines of the cooperage company?

Mr. BARRON. Yes.

Mr. GLASGOW. Will you tell me along that line what industries are there at Poplar Bluff or Linstead?

Mr. BARRON. What industries are there at Poplar Bluff?

Mr. GLASGOW. Or Linstead?

Mr. BARRON. At Poplar Bluff is the mill of the Brooklyn Cooperage Company, engaged in the manufacturing of staves and headings. At Poplar Bluff is the mill of the Quercus Lumber Company, engaged in the manufacture of oak lumber. At Poplar Bluff is the mill of the Oil Well Supply Company, engaged in the
40 manufacture of sucker rods for deep wells and hickory lumber. At Poplar Bluff is the mill of the Putnam Manufacturing Company, engaged in making handles.

Mr. GLASGOW. Has the Brooklyn Cooperage Company any interest whatever in the mill of the Quercus Lumber Company or the Oil Well Supply Company or the Putnam Hickory Mill?

Mr. BARRON. None whatever.

Mr. GLASGOW. The Quercus Lumber Company, however, does buy some of the lumber or timber that they use, from the Great Western Land Company?

Mr. BARRON. It buys oak logs from the Great Western Land Company.

Commissioner HARLAN. Does it buy them delivered?

Mr. BARRON. No, sir; the logs are scaled by two men, one employed by the Quercus Lumber Company and the other by the Great Western Land Company. They are loaded on the ground of the Great Western Land Company, and on the track of the Brooklyn Cooperage Company. Now, the Great Western Land Company pays the freight. Now, where that point of delivery is, is perhaps a nice legal question, and I would not undertake to say, but the title passes on the ground on these private tracks of the Brooklyn Cooperage Company.

Commissioner HARLAN. You mentioned two other companies. Do they get their wood from the Butler County Railway?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Altogether?

Mr. BARRON. No, sir; not altogether.

Commissioner HARLAN. Largely?

Mr. BARRON. Very largely.

41 Commissioner HARLAN. And is that wood sold to them by the Great Western Land Company in practically the same way?

Mr. BARRON. Most of it.

Commissioner HARLAN. And delivered in the same way; the title passes on the logging road of the Brooklyn Cooperage Company?

Mr. BARRON. No, some of the other customers of the Great Western Land Company cut the timber themselves and haul it.

Commissioner HARLAN. And they pay the freight?

Mr. BARRON. And they pay the freight; yes, sir.

Mr. GLASGOW. Is there any other connection between the Quercus Lumber Company, the Putnam Hickory Mill, and the Oil Well Supply Company, other than you have stated?

Mr. BARRON. By connection you mean railroad connection or proprietary interest?

Mr. GLASGOW. I mean proprietary interest, affiliation, ownership or other than that you have detailed, as to getting lumber from the lands of the Great Western Land Company?

Mr. BARRON. None whatever.

Mr. GLASGOW. Coming down to Bailey's, can you tell us what, if any, industries are located there?

Commissioner HARLAN. Proceed as rapidly as you can.

Mr. GLASGOW. Is there a cotton gin there?

Mr. BARRON. There is a cotton gin there and a saw mill in that immediate vicinity.

Mr. GLASGOW. Drummond's saw mill?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And a cattle pen?

Mr. BARRON. Yes, sir.

42 Mr. GLASGOW. Do the Great Western Land Company or the Brooklyn Cooperage Company have any interest in the cotton gin or Drummond's mill?

Mr. BARRON. No.

Mr. GLASGOW. It is separate and independent?

Mr. BARRON. Nor in the cattle pen, which is separate and independent.

Mr. GLASGOW. Take it down at Melville?

Mr. BARRON. Well, there is a saw mill at Batesville.

Commissioner HARLAN. Is there a logging road joining your line at Bailey's?

Mr. BARRON. No.

Commissioner HARLAN. How far is this mill away?

Mr. BARRON. Something less than a mile.

Commissioner HARLAN. How do they get the lumber over there?

Mr. BARRON. By team.

Commissioner HARLAN. Does that mill own forests?

Mr. BARRON. It owns timber.

Commissioner HARLAN. It is lumbering its own timber?

Mr. BARRON. Yes.

Commissioner HARLAN. And not the timber of the Great Western Company?

Mr. BARRON. No.

Mr. GLASGOW. And it hauls it up to Bailey's to your road?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Just as the Brooklyn Cooperage Company does up to the points of connection with the logging road?

Mr. BARRON. Yes, sir; and then the farmers in that neighborhood are making ties and handle bolts and such things.

43 Commissioner HARLAN. They haul them to your road?

Mr. BARRON. Yes.

Commissioner HARLAN. Do you give them any allowance?

Mr. BARRON. No.

Commissioner HARLAN. They bear the expense of their haul?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Do you give the Brooklyn Cooperage Company any allowance for hauling it up to the line of your road?

Mr. BARRON. Yes.

Commissioner HARLAN. There was another mill you said, at Batesville?

Mr. BARRON. At Batesville.

Commissioner HARLAN. Just north of Bailey's?

Mr. BARRON. No.

Commissioner HARLAN. What timber is that mill getting?

Mr. BARRON. They are getting private timber.

Commissioner HARLAN. Not of the Great Western Land Company?

Mr. BARRON. No.

Commissioner HARLAN. How far from your track is that situated?

Mr. BARRON. That is on our track.

Commissioner HARLAN. How do they get their logs to the mill?

Mr. BARRON. By teams.

Commissioner HARLAN. What distance?

Mr. BARRON. Well, they haul within two miles.

Commissioner HARLAN. You do not pay them anything, do not give them any allowance?

Mr. BARRON. No, sir.

44 Mr. GLASGOW. You do not give anybody allowances for bringing traffic up to your line?

Mr. BARRON. No, sir.

Mr. GLASGOW. Now, at Melville there is a cattle pen there for receiving cattle also?

Mr. BARRON. Yes.

Mr. GLASGOW. There is Baumhoefer's mill?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And Talley's mill?

Mr. BARRON. Talley's mill. Mr. Talley tendered to the railroad in November, 18 cars of lumber, and we shipped it from Melville for him.

Commissioner HARLAN. Has he a logging road?

Mr. BARRON. No.

Commissioner HARLAN. How many miles south of Melville is that mill?

Mr. BARRON. Three.

Commissioner HARLAN. How does he get there with his manufactured lumber?

Mr. BARRON. Hauls it by team.

Commissioner HARLAN. Three miles?

Mr. BARRON. Yes.

Commissioner HARLAN. Who bears the expense of that?

Mr. BARRON. He does.

Commissioner HARLAN. You do not give him any allowance?

Mr. BARRON. No, sir.

Examiner BURCHMORE. It would be more convenient for him if he could haul his lumber over to the Brooklyn Cooperage Company's private line and there ship it, would it not? He is very near to their line.

Mr. BARRON. It is a mile and a half away.

Commissioner HARLAN. And he hauls it three miles to Melville?

45 Mr. BARRON. Yes, sir; he has a better road.

Mr. GLASGOW. Has there been any application made to the Brooklyn Cooperage Company, so far as you know, to allow them to use that line if they wanted to?

Mr. BARRON. No.

Commissioner HARLAN. Has there ever been any talk about it?

Mr. BARRON. That is a new line; it has been built this year.

Commissioner HARLAN. I know, but there has been a whole year in which he could take up that question with them.

Mr. BARRON. Well, he has not done so.

Commissioner HARLAN. Does he know it is there?

Mr. BARRON. Yes, sir; he knows it is there.

Mr. GLASGOW. You say he has a better road to Melville than from his place to the tracks owned by the Brooklyn Cooperage Company?

Mr. BARRON. Yes, sir. That railroad is not quite complete down at the lower end, because it is in such a swampy, wet country that we have not been able to finish it, and that is probably the reason he has not applied for the use of that track.

Commissioner HARLAN. You say farmers have bought up some of these lands?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. They cut down trees occasionally, do they not?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. What do they do with them?

Mr. BARRON. They sell them.

Commissioner HARLAN. Sell them to the mills?

46 Mr. BARRON. They will sell them to whoever will buy them.

They will sell, depending what it is——

Commissioner HARLAN. Do they sell the standing tree?

Mr. BARRON. No; they sell the product of the tree.

Commissioner HARLAN. Does it not happen occasionally that they carry those logs to the mill and have them lumbered and then use the lumber?

Mr. BARRON. Yes, sir; very frequently.

Commissioner HARLAN. And sell it?

Mr. BARRON. No; they use the lumber.

Commissioner HARLAN. Don't they occasionally sell it?

Mr. BARRON. No; I don't think so. When they carry the log to the saw mill and have it sawn, it is usually for their own purposes—to build houses and barns with.

Commissioner HARLAN. You do not have shipments over your road of small lots of lumber for anybody?

Mr. BARRON. Yes, sir; we do; a great many.

Commissioner HARLAN. Tell us about those. For whom?

Mr. BARRON. Well, from Poplar Bluff we have a great many small shipments of finished lumber to stations down the railroad——

Commissioner HARLAN. I am talking about the lumber the other way.

Mr. BARRON. No, sir; there is no movement of lumber the other way in small lots; it is all in carloads.

Commissioner HARLAN. Well, do you have shippers that give you one or two carloads in a year?

Mr. BARRON. Yes, sir.

47 Commissioner HARLAN. And are there many such shippers?

Mr. BARRON. You speak of lumber?

Commissioner HARLAN. Yes.

Mr. BARRON. Yes; there are two or three.

Commissioner HARLAN. Do they have mills?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Are there any pony mills down in that country?

Mr. BARRON. Yes.

Commissioner HARLAN. Where are they?

Mr. BARRON. Well, there are two on what we call the Hicoria spur.

Commissioner HARLAN. Is that the spur of the cooperage company?

Mr. BARRON. No, sir; the cooperage company owns it, but the Butler Railroad Company runs it——

Commissioner HARLAN. You mean the spur up from Hicoria to Menorkenut?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. What is a pony mill?

Mr. BARRON. Well, I presume by pony mill is meant a portable mill.

Mr. GLASGOW. I understood you to say that the Baumhoefer mill, Talley's mill, the P. & S. lumber mill, were at Melville or in the vicinity of it?

Mr. BARRON. No; the P. & S. Lumber Company has a couple of mills on the Hicoria spur.

Mr. GLASGOW. Does it not also have one at Melville?

Mr. BARRON. No.

Mr. GLASGOW. And Melville is the point where the mail is carried for Quelin?

Mr. BARRON. Yes.

48 Mr. GLASGOW. What is the character of the Butler County Railroad, as to its physical character, equipment, rails, and so forth?

Mr. BARRON. The road which was first built was 56 pounds; all that has been built in the last five years is 60 pounds steel.

Mr. GLASGOW. How does it compare with the road of the trunk line carriers that you join?

Mr. BARRON. Well, I would not like to say that. I think we have got a pretty good road; we carry 100,000 pounds capacity cars over it every day, loaded to capacity.

Mr. GLASGOW. Mr. Barron, does the Butler County Railroad on these through rates which have been in effect on lumber and on the class rates—do you issue through bills of lading?

Mr. BARRON. Yes, sir. I have got last month's bills of lading right here.

Mr. GLASGOW. Are they on the form that has been approved by the commission?

Mr. BARRON. Yes, sir; it is on the universal form.

Mr. GLASGOW. There is no use to file them, I suppose?

Commissioner HARLAN. No. Have you prepared any exhibit showing the tonnage of your road?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. I am coming right to that. Have you a statement prepared of the earnings of your passenger business?

Mr. BARRON. Yes.

Mr. GLASGOW. For the year ending June 30, 1910, and for the five months ending November 30, 1910?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. We offer that in evidence.

(The paper so offered and identified was received in evidence 49 and thereupon marked Butler County Railroad Exhibit No. 3, witness Barron, received in evidence December 9, 1910, and is attached hereto.)

Mr. GLASGOW. Tell us approximately how many passengers per day are handled.

Commissioner HARLAN. We will not go into those details. That is all shown on the exhibit, and can be argued later.

Mr. GLASGOW. No, that is not shown on the exhibit.

Commissioner HARLAN. Well, it ought to be.

Mr. GLASGOW. The total is shown.

Commissioner HARLAN. Very well; ask the question.

Mr. BARRON. We carry 75 passengers per day.

Mr. GLASGOW. Have you prepared a statement showing the tonnage and revenue of the Butler County Railroad, from traffic handled for the Brooklyn Cooperage Company and for all other traffic?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And all other traffic, including the lumber which has been mentioned as being sold by the Great Western Land Company, and which the purchasers take from their lands to mills, and so forth?

Mr. BARRON. Yes, sir; to mills, and that is also sold direct in the form of ties and piling to railroads and brokers.

Mr. GLASGOW. I want to file the monthly statement, beginning July 1st, 1909, and ending June 30th, 1910, and for the five months beginning July 1st, 1910, and ending November 30th, 1910.

(The papers so offered and identified were received in evidence and thereupon marked Butler County Railroad Exhibits Nos. 4 and 5; witness Barron, received in evidence December 9, 1910, and are attached hereto.)

Mr. COWAN. I suggest when a statement of that kind is filed that the summary ought to be stated in the record, because these copies will never be furnished to anybody.

Mr. GLASGOW. Can you tell us the number of cars handled by the Butler County Railroad from July 1st, 1909, to June 30th, 1910, all cars handled?

Mr. BARRON. You are speaking of carload freight?

Mr. GLASGOW. Yes.

Mr. BARRON. Yes, sir; I can tell you.

Mr. GLASGOW. You have it on that yellow memorandum you have got?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Does this yellow sheet summarize the larger sheet you have just offered in evidence?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Just give us the summary.

Mr. GLASGOW. The number of cars for the year ending June 30th, 1910.

Mr. BARRON. 10,436.

Mr. GLASGOW. What number of cars out of that were handled for the Brooklyn Cooperage Company?

Mr. BARRON. 6,593.

Mr. GLASGOW. How many for all other carload freight?

Mr. BARRON. 3,843.

Mr. GLASGOW. What was the percentage of freight cars handled by the Butler County Railroad Company for the Brooklyn Cooperage Company?

Mr. BARRON. 63 per cent.

51 Mr. GLASGOW. And 37 per cent for other carload freight?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And the number of tons handled by the company, total, was what?

Mr. BARRON. 188,403.

Mr. GLASGOW. And the number out of that handled for the Brooklyn Cooperage Company?

Mr. BARRON. 108,722 tons.

Mr. GLASGOW. And other carload freight?

Mr. BARRON. 78,441.

Mr. GLASGOW. And the less than carload freight?

Mr. BARRON. 1,240 tons.

Commissioner HARLAN. Of that other carload freight, 78,000 tons, what part contained lumber of the Great Western Land Company?

Mr. GLASGOW. You mean from—

Mr. BARRON. None. The Great Western Land Company has no lumbering.

Commissioner HARLAN. Well, the Great Western Land Company, you said, sold lumber?

Mr. BARRON. No, sir.

Mr. GLASGOW. Timber.

Commissioner HARLAN. I was not using the word "lumber" in the correct sense. How much timber, then, was moved in that 78,000 tons that had been sold by the land company to mills other than the cooperage company mills?

Mr. GLASGOW. None of that was sold to the cooperage company. I will answer it, to expedite it. We have not got this analyzed down to the point to show that of that other carload freight how much is timber coming from the lands of the Great Western Land Company.

We have not analyzed it to that point.

52 Commissioner HARLAN. Your figures do not show that?

Mr. BARRON. No.

Commissioner HARLAN. You can get that, can you not?

Mr. BARRON. Yes, sir; I can get it.

Commissioner HARLAN. I wish you would do so, and file it as an exhibit. You have testified about certain mills that either cut the timber themselves or buy it delivered on the tramways of the Brooklyn Cooperage Company?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. We want an examination and a statement of the amount of that timber that goes over the Butler County Railroad.

Mr. GLASGOW. Would you not want that analyzed a little further, to show what proportion of it goes to each of the purchasers?

Commissioner HARLAN. Well, he can analyze it as he chooses, if he shows that result.

Mr. BARRON. That is on timber that goes to these outside mills?

Commissioner HARLAN. Yes.

Mr. GLASGOW. He wants to know how much of that 78,000 tons comes from timber which was cut on the land of the Great Western Land Company.

Mr. BARRON. And went to these mills?

Mr. GLASGOW. Yes.

Mr. BARRON. All right.

Commissioner HARLAN. Or went elsewhere, all of it that moved over your road.

Mr. BARRON. Well, now, Judge, half of that material that comes off of the Great Western Land Company's land goes to mills, and the other half goes direct in some form that does not require
53 manufacturing; for instance, piling; there is a very large volume of that that goes out.

Commissioner HARLAN. Very well; show that. Show all the timber that comes off the Great Western Company's lands and is moved by your line, and for whom it is moved.

Mr. BARRON. All right.

Commissioner HARLAN. And if you can now, tell us about what proportion of that 78,000 tons constitutes timber of that kind. We would like to know it.

Mr. BARRON. I can not.

Commissioner HARLAN. Very well.

Mr. GLASGOW. What is the percentage of carload freight handled by the Butler County Railroad Company for the Brooklyn Cooperage Company—the percentage of the total?

Mr. BARRON. In tons?

Mr. GLASGOW. No; the percentage of the whole number of tons handled for the Brooklyn Cooperage Company.

Mr. BARRON. Fifty-seven per cent.

Mr. GLASGOW. And 42 per cent is other carload freight?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And 1 per cent is less than carload?

Mr. BARRON. Yes.

Mr. GLASGOW. Now, the revenue earned, what proportion of that comes from the carload freight handled for the Brooklyn Cooperage Company?

Mr. BARRON. Thirty-nine per cent of the revenue derived—

Mr. GLASGOW. Let us get the dollars first.

Mr. BARRON. \$28,092.

54 Mr. GLASGOW. What comes from other carload freight?

Mr. BARRON. \$41,133.

Mr. GLASGOW. And less than carload freight?

Mr. BARRON. \$4,427.

Mr. GLASGOW. And the percentage of the revenue which is derived from the carload traffic of the Brooklyn Cooperage Company is what per cent?

Mr. BARRON. Thirty-nine per cent of the whole.

Mr. GLASGOW. And the other carload freight?

Mr. BARRON. Fifty-five per cent.

Mr. GLASGOW. And less than carload freight?

Mr. BARRON. Six per cent.

Commissioner HARLAN. I would like you to extend those figures so as to cover the timber we have just been talking about.

Mr. BARRON. Well, it will only change one line.

Mr. GLASGOW. I think practically what you want is a statement of all the shippers and what tonnage is handled for them?

Commissioner HARLAN. Well, the witness understands. I want the information and percentages of this outside tonnage we have just been talking about.

Mr. BARRON. Yes, I understand.

Mr. GLASGOW. Now, then, for the five months of the year 1910, beginning July 1st, I will read this without asking the question. The number of cars handled—

Commissioner HARLAN. I think if you will just file it, that will be sufficient.

Mr. GLASGOW. Mr. Cowan asked to put it in the record.

Commissioner HARLAN. We need all the time we have got. Now,

Mr. Glasgow, if you will oblige the commission by filing it—

55 Mr. GLASGOW. I am going to do it, but I was told that counsel wanted the figures.

(The papers so offered and identified were received in evidence and thereupon marked Butler County Railroad Exhibits Nos. 6 and 7, Witness Barron, received in evidence December 9, 1910, and are attached hereto.)

Mr. GLASGOW. You know the tariffs which you have had in effect with the Iron Mountain and the St. Louis and San Francisco road. Can you give us a statement showing the divisions of the through rates to points, St. Louis, New York, New Orleans, Cairo, Thebes, Memphis, and East St. Louis; first in connection with the Iron Mountain, and second, in connection with the St. Louis & San Francisco?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Have you that statement?

Mr. BARRON. Yes, sir.

(The papers so offered and identified were received in evidence and thereupon marked Butler County Railroad Exhibits Nos. 8 and 9, Witness Barron, received in evidence December 9, 1910, and are attached hereto.)

Commissioner HARLAN. Was there a larger percentage of traffic for the controlling mill for the year ending June 30th, 1909, than there was for the year ending June 30th, 1910?

Mr. BARRON. I think not. The controlling mill's output has been quite uniform, but the other business has been growing quite rapidly.

Commissioner HARLAN. Then the percentage last year would be larger, would it not, if the percentage of the other has grown rapidly this year?

Mr. BARRON. Yes, sir; the percentage of the outside business was larger this year than before.

56 Commissioner HARLAN. What was the percentage of the inside business last year; the controlling mill's traffic?

Mr. BARRON. You have it there.

Commissioner HARLAN. I mean for the year ending June 30th, 1909.

Mr. BARRON. I have not got the figures, but it would be larger, of course, than——

Commissioner HARLAN. Have you any idea what the percentage was for that year?

Mr. BARRON. It would not be a great deal greater; the outside business is growing. At the beginning, the outside business——

Commissioner HARLAN. If you do not know, we will not stop.

Mr. BARRON. I do not know; no; but it is not a great deal different.

Mr. GLASGOW. Will you please tell us in connection with the two statements you have just filed, showing the divisions which the Butler County Railroad gets, what is the service rendered by the Butler County Railroad for the division of rates which it gets?

Mr. BARRON. The service performed by the Butler County Railroad Company is the transportation of the timber from the point where it is tendered to the Butler County Railroad to destination. Some of it is milled in transit. Now, the compensation—of course I say it is transported to destination for the through rate, of which we get that division. Now, the compensation that is received is on the cheaper grades of lumber, one cent per 100 pounds on the logs, and on the more valuable kinds of timber, one and one-half cents per 100 pounds on the logs, for the milling in transit service, for handling it, and then the division on the manufactured product, if it is milled.

57 Mr. GLASGOW. To illustrate it briefly, take a log you receive at Menorkenut, on your line, that is going through, a through shipment of the lower grades. As I understand, you carry that log down on your line to the mill at Linstead?

Mr. BARRON. Down to the Brooklyn Cooperage Company's mill, say, at Linstead; yes, sir.

Mr. GLASGOW. There it is milled in transit?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Then you handle that from the mill tracks over to the long-line road, and deliver it?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And for that you get the proportion shown in the statement filed? As shown in the tariff?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And in addition to that, you get one cent per 100 pounds for your own tariff on the log?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And if it is the higher grade of log, one and one-half cents per 100 pounds?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. What is the total earnings of your road, then, on the shipment?

Mr. BARRON. On the shipment?

Commissioner HARLAN. Yes.

Mr. BARRON. Well, it takes about five cars of logs to make one of lumber or manufactured material. Now, we get an average of \$4.00 a car on the logs; that is \$20.00, and three cents per 100 pounds under the junction rate, say, 60,000 pounds, is \$18.00. Now, we get \$38.00 for handling, say, five and a half cars.

Commissioner HARLAN. To the mill, and how many cars from the mill?

58 Mr. BARRON. No; four and one-half cars to the mill and one from the mill.

Commissioner HARLAN. And what is the distance from the mill to the junction with the Rock Island?

Mr. BARRON. Half to three-quarters of a mile.

Examiner BURCHMORE. That is the distance from the outside of your plant to the line of the Iron Mountain, or does that include the haul inside the plant?

Mr. BARRON. Well, it will average a little over half a mile. You take the mill of the Quercus Lumber Company, that stands about half a mile away from the junction point of the Iron Mountain and 'Frisco. The Brooklyn Cooperage Company's mill is about the same, and the handle mill about the same.

Commissioner HARLAN. Who hauls it from the mill to the regular line?

Mr. BARRON. The Butler County Railroad.

Mr. GLASGOW. Are there any other mills in competition with the Brooklyn Cooperage Company's mill in the sale of the manufactured products?

Mr. BARRON. No, sir; the products of the Brooklyn Cooperage Company's mill is consumed by the proprietor of the mill, by the real owner, the beneficial owner of the property. It is not sold.

Mr. GLASGOW. Is there anybody in that vicinity making the same character of stuff?

Mr. BARRON. Yes, sir; but in a very small way, a very insignificant way.

Mr. GLASGOW. And the product of the Brooklyn Cooperage Company's mill does not come into competition with that product?

Mr. BARRON. No, sir. Whenever there is any transaction of that character at all it is the purchase by the Brooklyn Cooperage Company of the product of the outside mill, and not a sale except—

59 Mr. GLASGOW. I think that is all. I will ask to have these maps marked as exhibits.

(The maps so offered and identified were received in evidence and thereupon marked Butler County Railroad Exhibits Nos. 10 and 11, witness Barron, received in evidence December 9, 1910, and are attached hereto.)

Examiner BURCHMORE. You testified that the Butler County Railroad was incorporated in 1905?

Mr. BARRON. Yes.

Examiner BURCHMORE. Did you give the date on which it was built, or the first building?

Mr. BARRON. I did not.

Examiner BURCHMORE. What was the first construction?

Mr. BARRON. 1899.

Examiner BURCHMORE. Prior to the incorporation in 1905 did or did not the Butler County Railroad, I mean the line that was then in existence, receive allowances from the Missouri Pacific System?

Mr. BARRON. It did not.

Examiner BURCHMORE. It received none?

Mr. BARRON. No.

Examiner BURCHMORE. Has the Butler County Railroad any contract in effect now with the Iron Mountain System covering through rates or allowances?

Mr. BARRON. Well, I guess not; nothing more than is shown in the tariffs.

Examiner BURCHMORE. Any contract, not a tariff, but a contract.

Mr. BARRON. Well, then, if a tariff is not a contract, it has no contract; no, sir.

Examiner BURCHMORE. Has it in the past had any such contract for divisions?

60 Mr. BARRON. No, sir.

Examiner BURCHMORE. Does the Brooklyn Cooperage Company now have, or has it in the past had such a contract with the Iron Mountain System?

Mr. BARRON. No.

Examiner BURCHMORE. Would you know if there had been such a contract in existence in the past?

Mr. BARRON. I would.

Mr. GLASGOW. Have you any information that there is? Because I will look it up if you have.

Commissioner HARLAN. What are you the president of?

Mr. BARRON. Nothing.

Commissioner HARLAN. What is your relation to the railroad company?

Mr. BARRON. I am vice president.

Commissioner HARLAN. As such, are you authorized to sign contracts?

Mr. BARRON. For the railroad company; yes, sir.

Commissioner HARLAN. For the railroad company?

Mr. BARRON. Yes.

Commissioner HARLAN. Is any one else authorized to sign contracts?

Mr. BARRON. Well, I don't remember what the by-laws provide, but I have done all of the business; there has nobody else done anything except me; I have done it all.

Commissioner HARLAN. I want to put to you the question: Is there any contract between the Iron Mountain or the Missouri Pacific or any other line governing the amount of divisions that are received by the Butler County Railroad, whether that contract is with
61 your railroad, or with the American Sugar Refining Company or the Land Association, or the Brooklyn Cooperage Company?

Mr. BARRON. I do not know what you mean by a contract. They have got a division sheet, issued, but that is all I know anything about.

Commissioner HARLAN. I am talking about a formal contract.

Mr. BARRON. No, sir; there is none and never was.

Examiner BURCHMORE. One of your companies has a contract with the Iron Mountain under which these trackage rights are exercised.

Mr. BARRON. That is a verbal contract which runs from month to month. They perform the service and send us a bill for so much money, and we pay it.

Examiner BURCHMORE. There was a written contract some time ago?

Mr. BARRON. Yes; there was a written contract covering these trackage rights, but that was made by an individual with the Iron Mountain Railroad, and it is so long ago it has been forgotten.

Examiner BURCHMORE. Who was that individual?

Mr. BARRON. That individual was a man named Lowell M. Palmer.

Examiner BURCHMORE. Who was Lowell M. Palmer?

Mr. BARRON. But that did not cover any question of divisions; it just provided for the running of the trains, and fixed the amount of the trackage and the amount per train mile.

Examiner BURCHMORE. Why was that contract discontinued; why did you abandon that method and resort to a verbal contract, if you know?

Mr. GLASGOW. When was the date of this contract?

62 Mr. BARRON. That contract was made in 1899, when the business was started out there. At that time the land was owned by Lowell M. Palmer.

Commissioner HARLAN. Have you a copy of that contract?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Will you supply a copy to the commission?

Mr. BARRON. Certainly; but that was before these companies ever acquired any of this land—

Mr. GLASGOW. May I ask—because I never heard of this before—what is the purpose of going back to 1899 on this?

Commissioner HARLAN. For the purposes of this inquiry.

Mr. GLASGOW. That does not give me any information.

Commissioner HARLAN. We want to get all of the information that is available.

Mr. GLASGOW. I thought if I knew your Honor's purpose, I might be able to assist in getting it out.

Mr. JEFFERY. I will state at this time I know there is no contract for divisions between the Butler County Railroad and either the Missouri Pacific or the Iron Mountain. You will recollect that we withdrew from our written contracts which we had with any tap line, and there was only one. This is the first I ever heard of this one, and it must be with an individual.

Commissioner HARLAN. The witness has said that it was.

Mr. JEFFERY. But there is none with the Butler County Railroad. In fact, there is none in effect with any now.

Examiner BURCHMORE. You testified that the amount of
63 compensation paid to the Iron Mountain for trackage rights was so much per train; I think you mentioned 85 cents per train of 25 cars.

Mr. BARRON. No; I said it was 65, 75, and 85.

Examiner BURCHMORE. Does your road run a train composed of as many as 35 cars?

Mr. BARRON. Yes, sir.

Examiner BURCHMORE. I ask the question because your time table shows three trains each way each day. You testified your total traffic last year amounted to something in excess of 10,000 cars, which would be, in rough numbers, 35 a day. Those 35 were apparently handled in six trains.

Mr. GLASGOW. I suggest that Mr. Barron has not testified that he hauled an average of 35 cars a day over the road. I suppose it is like any other road—

Examiner BURCHMORE. The only question I desire to ask is: What is the average payment per train which you make for these trackage rights, in a general way?

Mr. BARRON. Well, it is 75 cents per mile.

Examiner BURCHMORE. That is your average actual payment?

Mr. BARRON. Yes, sir. Now, you say we operate three trains a day. That is correct, but two of those trains do not handle any freight business to speak of. All of the freight business is handled by one train, and the train will carry on an average, I would say, 42 cars. It is a level track and a good engine, and we put all that business into one train and get over the ground faster with the other two, the other two being devoted, I might say, exclusively to passenger business.

Examiner BURCHMORE. You testified that lines of railroad marked in red on this first map were owned by the Butler County Railroad Company.

64 Mr. BARRON. Yes, sir.

Examiner BURCHMORE. Is that an actual ownership in fee of the land, or a long term lease of the land, or some other kind of lease of the land from the Brooklyn Cooperage Company?

Mr. BARRON. It is an actual ownership in fee of the land.

Commissioner HARLAN. And the rails?

Mr. BARRON. Yes, sir; and the rails and the ties and spikes.

Examiner BURCHMORE. The town known as Linstead; is it within the municipal limits of Poplar Bluff?

Mr. BARRON. It is not.

Examiner BURCHMORE. Within what distance is it of Poplar Bluff?

Mr. BARRON. Well, the property there constitutes the eastern boundary of part of Poplar Bluff, and there is about 120 acres of land devoted to manufacturing businesses outside of the municipal limits.

Examiner BURCHMORE. You referred in your testimony to three other industries at Linstead or Poplar Bluff, the Oil Well Supply Company, the Quercus Lumber Company, and the Putnam Manufacturing Company. Are the mills or factories of those companies on ground owned by the Brooklyn Cooperage Company; that is, are they lessees of the Cooperage Company?

Mr. BARRON. They are, all of them; and up until a few months there was another mill there, the Garretson & Greacen Lumber Company.

Examiner BURCHMORE. Can you indicate in a general way what that lease arrangement is?

Mr. BARRON. Yes, sir; the Brooklyn Cooperage Company leased five acres of land to the Oil Well Supply Company for a rental of \$150 per annum, on which they constructed a mill which they
65 operate, and a similar arrangement was made with the Quercus Lumber Company, and on another piece of ground of 20 acres. Later on another arrangement similar to the other two was made with the Putnam Manufacturing Company for its mill site.

Examiner BURCHMORE. And substantially the same rental consideration—the same general basis?

Mr. BARRON. The same general basis; yes, sir.

Examiner BURCHMORE. Does the line of the Butler County Railroad connect with any other railroad than the Iron Mountain?

Mr. BARRON. Yes, sir.

Examiner BURCHMORE. With the 'Frisco?

Mr. BARRON. Yes, sir.

Examiner BURCHMORE. At what point?

Mr. BARRON. Well, they call that Poplar Bluff.

Examiner BURCHMORE. There is an actual physical connection at Poplar Bluff?

Mr. BARRON. There is an actual physical connection, but it is not in the city of Poplar Bluff, it is outside on this same tract of ground.

Examiner BURCHMORE. Does your company maintain joint through rates in connection with the 'Frisco generally?

Mr. BARRON. Not generally on lumber.

Examiner BURCHMORE. Practically its entire traffic goes out over the Iron Mountain?

Mr. BARRON. No, sir; the 'Frisco gets some. The Iron Mountain has been pretty short of cars lately, and the 'Frisco got the bulk of it.

Examiner BURCHMORE. What rates apply over the 'Frisco—the combination of locals?

Mr. BARRON. No; there are some through rates there. We have never gotten down to the combination of local rates yet, and I hope we never shall.

66 Examiner BURCHMORE. There are joint through class rates in effect over your line in connection with the Iron Mountain to interstate destinations, and those are published and filed with the commission. What is the publication of those rates; that is to say from stations on your line are the class rates to interstate destinations the same as the class rates from the junction points, Lowell, and the same as the class rates from Popular Bluff? Perhaps that is a little long—

Mr. BARRON. It was a little indirect.

Examiner BURCHMORE. The question is this: Are these joint through class rates in effect over your line to interstate destinations the same as the junction class rates, or are they made on the combination of locals?

Mr. BARRON. They are made, some of them are on a combination of locals, and some are not. Some are joint through rates.

Examiner BURCHMORE. But the amount of those joint through rates; are they as low as the joint through rates—

Mr. BARRON. As the combination of locals? They are lower.

Examiner BURCHMORE. Are they as low as the through rates in effect from Popular Bluff?

Mr. BARRON. No; they are higher.

Examiner BURCHMORE. They are substantially equal to the sum of the locals?

Mr. BARRON. No; they are less than the sum of the locals.

Examiner BURCHMORE. You testified that you had class and commodity rates filed with the commission between points on the Butler County Railroad, local rates?

Mr. BARRON. Yes, sir.

67 Commissioner HARLAN. Is your division less or greater than your locals?

Mr. BARRON. Why, Judge, I will tell you. Up to about a month ago it was less, but I went to Mr. Perkins and Mr. Johnson and I complained about that, and they were good enough to increase it so it is a shade more. It formerly was 27 per cent, and it is now 33 per cent. Twenty-seven per cent was a shade too low, and 33 per cent would just carry it.

Commissioner HARLAN. The percentage of the joint through rates?
Mr. BARRON. Yes.

Commissioner HARLAN. Now, you get a division that is larger than the local?

Mr. BARRON. Well, it is our local plumb; the scale goes down like that; but before that, it did not, it went down on the other side; but it is not substantially different from the sums of our locals; that is, on those rates which are based on the sum of the two locals. Now, there are certain rates which are not arrived at in that way, we agree on the division arbitrarily.

Mr. JEFFERY. That is less than carload business, and not lumber?

Mr. BARRON. That is less than carload business and not lumber; yes; general classes and commodities. But now, live stock and cattle which goes in carloads, on which there are through rates; that is not dealt with on the basis of the sum of the two locals, but it is competitive, and we met it, both took less than the sum of our local rate,

Examiner BURCHMORE. On these through class rates are all points on your line blanketed; do they all take the same rate?

Mr. BARRON. No, sir—well, no, sir; they do not.

68 Examiner BURCHMORE. Do all points on your line south of Lowell Junction take the same rate?

Mr. BARRON. No, sir.

Examiner BURCHMORE. Those rates are scaled, graded?

Mr. BARRON. Yes, sir; except cotton and live stock.

Examiner BURCHMORE. Your index of tariffs, issued December 1, 1910, I. C. C. No. 5, under section 3, reads as follows: "Numerical list of Butler County Railroad Company tariffs bearing I. C. C. numbers, none." Does that not indicate that you have no local rates on file with the commission under your own I. C. C. number?

Mr. BARRON. It indicated that at the time that tariff was filed we had no local rates on file with the commission, but we have filed one since.

Examiner BURCHMORE. Since December 1st, 1910?

Mr. BARRON. Yes, sir. I have a copy of it here, I think, or Mr. Glasgow has it.

Examiner BURCHMORE. You referred to the transportation of the United States mails. Do you have a contract with the Government similar to the contracts entered into by the Government with all common carriers?

Mr. BARRON. Well, now, I never had anything to do with any other railroad, and I do not know what kind of a contract the other railroads have, but we have a contract with the Government which I presume is similar to the usual contracts.

Examiner BURCHMORE. The question with me is just this, the Government employs railroads to transport the mail as common carriers between various points; it also employs private individuals, or mail routes, to transport mail in carriages and otherwise—

69 Mr. BARRON. Well, the Government has employed us to transport the mails as a common carrier, and we get the railroad carrier's compensation for the service, which I might mention incidentally is very low.

Commissioner HARLAN. Do you mean your division is low?

Mr. BARRON. No; the total compensation; the through rate is low.

Mr. GLASGOW. The division with the Government is low?

Mr. BARRON. Yes, sir.

Examiner BURCHMORE. Do you carry any express matter?

Mr. BARRON. No. We have three trains a day, and it will go by freight just as fast as it will go by express.

Mr. GLASGOW. You give it all an expedited service?

Mr. BARRON. Yes, sir.

Examiner BURCHMORE. Has your company any track scales for weighing cars?

Mr. BARRON. No.

Examiner BURCHMORE. Has it any small scales for weighing L. C. L. freight?

Mr. BARRON. Yes, sir; it has team scales.

Commissioner HARLAN. Judge Cowan, have you some questions?

Mr. COWAN. I wanted to ask some questions about some of these divisions. In the exhibits which you have filed, Mr. Barron, showing the divisions with the Missouri Pacific and the St. Louis, Iron Mountain and Southern on lumber and cooperage stock handles and cotton, the rate from Poplar Bluff is stated to be 12 cents to St. Louis from all stations on the Butler County Railroad, of which you
70 get a division of five cents. Does that include the station called Linstead, where your factory is?

Mr. BARRON. No, sir; now pardon me, but you said the paper shows the rate from Poplar Bluff. Your question would have expressed what you meant if you had left that Poplar Bluff off, and said from all stations on the Butler County Railroad.

Mr. COWAN. Yes; they are both coupled here in the same category, but I see the rate is ten cents from Poplar Bluff and twelve cents from all stations on your road.

Mr. BARRON. Yes, sir.

Mr. COWAN. Out of that twelve cents you get five cents?

Mr. BARRON. Yes.

Mr. COWAN. Does that apply on traffic—lumber loaded into the cars at Linstead?

Mr. BARRON. Yes, sir; by reason of the milling in transit arrangement.

Mr. COWAN. Do you manufacture lumber, or does that term "lumber" means lumber products, staves, and barrel heads?

Mr. BARRON. Well, the lumber products go out on a commodity cooperage rate, and the lumber proper is manufactured by parties with whom we have no proprietary connection.

Mr. COWAN. You mentioned several factories to whom you had leased some land there.

Mr. BARRON. Yes, sir.

Mr. COWAN. And I assume that was for the purpose of concentrating the business there, and for your railroad to get the traffic loaded on its line and then transferred to the Iron Mountain, so you would get a division of the rate. Is that correct?

71 Mr. BARRON. Well, that matter was not altogether lost sight of; no. That railroad has got to live; it has enjoyed a division ever since it was created, and the result of the operation so far has been a net loss of \$8,000; and we had in mind that division; yes, sir, we had.

Mr. COWAN. There was no other compensation which would amount to anything to let them have the land on which to put the factory, except the fact that you would get a division of the rate on the lumber which they manufactured?

Mr. BARRON. Yes, sir; they all paid a fair rental value for the land they got.

Mr. COWAN. I think I heard you mention \$150 a year for five acres. I thought that was pretty cheap.

Mr. BARRON. Well, we paid \$60 an acre for the land.

Examiner BURCHMORE. Does that include the use of your mill pond?

Mr. BARRON. No; that is only the land.

Mr. GLASGOW. That is 50 per cent.

Mr. COWAN. On coopeage stock from all Butler County Railroad stations the rate to St. Louis is 35 cents, out of which you get—

Mr. BARRON. No, sir; that is New York.

Mr. COWAN. I am mistaken; 35 cents to New York, out of which you get three cents?

Mr. BARRON. Yes, sir.

Mr. COWAN. How does it come about that you get practically ten per cent on the New York shipments, and you get 40 per cent on the shipments to St. Louis?

Mr. BARRON. Because the haul is much longer to New York and the rate higher, and we do not haul it any longer or any farther on a New York shipment than on a St. Louis shipment.

72 Mr. COWAN. How far do you haul the lumber itself?

Mr. BARRON. The manufactured product?

Mr. COWAN. Yes.

Mr. BARRON. About three-quarters of a mile

Mr. COWAN. It is customary for the carload shipper of lumber or lumber products throughout the country to load the cars?

Mr. BARRON. Yes, sir.

Mr. COWAN. The railroad company does not undertake that?

Mr. BARRON. Yes, sir; they load the cars.

Mr. COWAN. At what expense is the Butler County Railroad per car for the handling of it from one of these lumber concerns there out to the Iron Mountain road?

Mr. BARRON. Ordinarily none, and I will explain why, because I applied to the American Railroad Association and the Central Storage and Demurrage Bureau for admission to those organizations, and they have so far deferred approving the application, and we are on a demurrage basis instead of a *per diem* basis. We do not pay *per diem*, and therefore we are at no expense for the cars.

Mr. COWAN. But I meant the expense of handling per car.

Mr. BARRON. The expense of handling per car?

Mr. COWAN. Yes. You switch it over about three-quarters of a mile, as I understand, and I wondered if you knew how much it cost you per car to do that.

Mr. BARRON. Well, it does not cost a great deal to do that, but that is not the entire service. We have got to get that timber in there to Linstead.

Mr. COWAN. I understand all that.

Mr. BARRON. And there is a 35 mile haul.

73 Mr. COWAN. How much do you get for hauling the logs into the mills of some of these other concerns which make lumber products which move to St. Louis on the 12 cent rate?

Mr. BARRON. One and one-half cents per 100 pounds, which will average about \$6.00 per car, and the haul will average 25 miles.

Mr. COWAN. Do you know what the Arkansas commission tariff is for hauling logs a similar distance?

Mr. BARRON. No, sir; we do not do business in Arkansas.

Mr. COWAN. Well, Missouri, then.

Mr. BARRON. About four and one-half cents per 100 pounds.

Mr. COWAN. For a distance of 25 miles?

Mr. BARRON. Yes, sir; either four or four and a half cents, I am not sure.

Mr. GLASGOW. Is that a local tariff?

Mr. BARRON. Yes, sir. I can tell you what it is.

Mr. GLASGOW. I do not care to go any further with it.

Mr. COWAN. I did not mean to take time with that.

Mr. GLASGOW. You need not go into that unless counsel desires.

Mr. COWAN. I see the rate on cotton to St. Louis from your stations is 14 cents per 100 pounds, out of which you get a ten per cent division. Why is the division on cotton so much less in percentage to the total than in the case of the lumber?

Mr. BARRON. Well, I expect the Missouri Pacific gentlemen out-traded me on that.

Mr. JEFFERY. They don't often do it, I guess.

74 Mr. BARRON. I am glad you called attention to it.

Mr. COWAN. I see the rate to Thebes from all stations on your line for lumber is ten cents, out of which you get five cents, and the Iron Mountain gets five.

Mr. BARRON. Well, that is a division of three cents under the junction rate, just as it is in the other cases, outside of cotton.

Mr. COWAN. I wanted to ask what the cooperage company pays for getting its logs in?

Mr. BARRON. It pays one cent per 100 pounds. Those logs are not worth more than 50 per cent of the value of the other logs.

Mr. COWAN. I notice that you do not have the blanket system of rates on lumber from your stations, but a two cent arbitrary above the average. I do not know whether it is an arbitrary, but it is two cents above the St. Louis rate.

Mr. GLASGOW. No.

Mr. BARRON. We have the blanket system, but it is not the same rate as the Poplar Bluff rate, it is a group rate.

Mr. COWAN. It is two cents more from stations on your line than from Poplar Bluff?

Mr. BARRON. Yes.

Mr. GLASGOW. But the whole line of stations on his line are grouped.

Mr. COWAN. Is there a blanket system of rates from the locality of Poplar Bluff on Iron Mountain stations?

Mr. BARRON. Yes, sir; but the blanket is not as big as it is farther south.

Mr. COWAN. How far down does this ten cent rate extend below Poplar Bluff?

75 Mr. BARRON. I do not know; but I do know that a point 15 miles south of Poplar Bluff carries a 10½-cent rate.

Mr. COWAN. How far north of Poplar Bluff does the ten-cent rate apply?

Mr. BARRON. That I do not know.

Mr. COWAN. Do you know the extent of the blanket to which the ten-cent rate applies from stations on the 'Frisco line to St. Louis?

Mr. BARRON. No, sir; but on the same parallel of latitude as the southern terminus of our road, the 'Frisco's rate to St. Louis is 12 cents, the same as ours; that is a point a few miles east of the southern end of our road.

Mr. COWAN. A man doing business on your line and shipping from stations on your line, either logs or lumber, would have to pay on the basis of two cents more than he would for an equal distance from St. Louis on the Iron Mountain or the 'Frisco. Your rates are two cents higher.

Mr. BARRON. No, sir. From a point on the 'Frisco as far south from St. Louis as our stations he would pay the same. He would pay a little more if he shipped over our road than he would if he shipped on the Iron Mountain from a point about as far south.

Mr. COWAN. You receive from the 'Frisco on shipments to Cairo also one-half of the ten-cent rate. Now, you spoke about them out-trading you on the cotton. By what sort of means were you able to get the 'Frisco Railroad and the Iron Mountain Railroad to give you one-half of the rate to Cairo and to Thebes; what inducement was there that would induce them to give you half the rate for the service you performed, and they take it and haul it on to Thebes or Cairo for the same amount they give your company?

76 Mr. BARRON. Well, they give us a division of three cents under the junction rate, and we haul it, say 35 miles to the mill, deliver it to the mill, switch them in and empty car and get the load and carry it out and haul it three-quarters of a mile, and they will haul it 70 miles. We will haul five cars 35 miles and they will haul one car 70 miles, and I think that we are not getting any more than we are entitled to.

Mr. JEFFERY. What is the through rate?

Mr. BARRON. I think ten cents; I am not quite sure.

Mr. COWAN. What is the distance from Poplar Bluff to Thebes?

Mr. BARRON. I should say 60—65 or 70 miles. I am not sure.

Mr. COWAN. Do you know what expense is involved in delivering at Thebes?

Mr. BARRON. No, sir.

Mr. COWAN. Nor Cairo?

Mr. BARRON. No, sir. I understand there is a bridge toll there.

Mr. COWAN. How much do you understand the bridge toll to be?

Mr. BARRON. A cent and a half.

Mr. COWAN. So, after paying the bridge toll, they would have, out of a shipment either to Cairo or Thebes, $3\frac{1}{2}$ cents left, $1\frac{1}{2}$ cents off of five cents.

Mr. BARRON. Well, assuming those figures are correct, that is so; but they only haul one car, while we have to handle six.

Mr. COWAN. Well, but at all events, three and one-half cents is what the net would be after they paid the bridge toll at Thebes or Cairo.

Mr. BARRON. It is three cents less than their regular rate, whatever that will be.

Commissioner HARLAN. Mr. Jeffery, is there a bridge toll at Thebes?

77 Mr. JEFFERY. Yes, I think there is. It is a bookkeeping proposition, for the reason that the Iron Mountain and the Cotton Belt and one other road own the bridge, and the Iron Mountain, for instance, gets one-third back of everything that goes over it.

Mr. COWAN. Let me ask at this point, Mr. Jeffery, however, it is a very expensive bridge, and you would not be making any money on your investment on one and one-half cents per 100 pounds.

Mr. JEFFERY. I could not say about that.

Mr. COWAN. What did the bridge cost, do you know?

Mr. JEFFERY. I haven't any idea.

Mr. COWAN. Now, you handle some carloads of lumber from stations on your line where there are some small sawmills where you do not handle the logs at all, but just handle the lumber?

Mr. BARRON. Yes, sir.

Mr. COWAN. In those cases you would haul the lumber, just one car?

Mr. BARRON. Yes.

Mr. COWAN. Down to the junction point of delivery?

Mr. BARRON. Yes.

Mr. COWAN. And get five cents per 100 pounds for it, while the railroad would take that and deliver it to Thebes or Cairo for the other part of the rate?

Mr. BARRON. Yes, sir; in those instances that is true.

Mr. COWAN. Your rates generally on that line for everything including lumber are a differential higher than the junction point rate to the outgoing destinations on the Mississippi River. That is, it appears so here?

Mr. BARRON. I do not think the classes are stated on here.

78 Mr. COWAN. No; but you stated a while ago that the rates were higher on points on your line than they are from junction points.

Mr. BARRON. Yes, sir; they are.

Mr. COWAN. Your New York rate, however, is the same on coop-
erage to New York—New York is the same rate, and it is also the
same to New Orleans from stations on your line as from Poplar
Bluff?

Mr. BARRON. Yes, sir.

Mr. COWAN. Is the cotton rate from points on your line the same
as from the junction point?

Mr. BARRON. No, sir; it is higher.

Mr. COWAN. How much higher; do you remember?

Mr. BARRON. No; I do not remember.

Mr. COWAN. That will be shown by the tariff, anyway?

Mr. BARRON. Yes.

Mr. COWAN. That is all. I wanted to inquire of Mr. Glasgow if
there has been any map or drawing of the track connections at
Poplar Bluff, showing the location of the industries, the switch
tracks, and their connection with the Iron Mountain and the 'Frisco?

Mr. GLASGOW. Nothing further than I have already offered in
evidence.

Mr. COWAN. I did not look at it.

Mr. GLASGOW. It did not show the terminal connections.

Mr. COWAN. I suggest in all these cases there ought to be a draw-
ing to show the terminal connections.

Mr. GLASGOW. What is the purpose of that?

Mr. COWAN. It enables the eye to see better than a verbal descrip-
tion.

Mr. GLASGOW. You will have a drawing showing your tracks from
the mill to the railroad?

79 Mr. BARRON. Yes, sir.

Mr. COLEMAN. Your coop-
erage rates from points on your
line are the same as from junction points to New York and other
points, are they not?

Mr. BARRON. To New York and New Orleans they are the same.

Mr. COLEMAN. You do not add the two cent arbitrary?

Mr. BARRON. We do on coop-
erage to everywhere except those two
points.

Mr. COLEMAN. The rate on lumber carries an arbitrary of two cents from points on your line over the rate from junction points?

Mr. BARRON. Yes, sir.

Mr. COLEMAN. The effect of that is to enable you to buy from those little men on your line a good deal cheaper?

Mr. BARRON. We do not buy from the little men.

Mr. GLASGOW. What little men are you referring to?

Mr. COLEMAN. Haven't you some individual lumber men on the line who would sell, some men with pony lumber mills?

Commissioner HARLAN. This witness said when they made a purchase of that sort it was a direct purchase by the cooerage company.

Mr. BARRON. Of the Great Western Land Company. Well, the Brooklyn Cooerage Company has purchased some tracts of timber also.

Mr. COLEMAN. And the effect of that adjustment would be to let them buy it two cents cheaper?

Commissioner HARLAN. This witness is talking about the purchase of land, and you are referring to manufactured material.

Mr. BARRON. We do not purchase any manufactured material.

80 Mr. COLEMAN. If they can add two cents on the lumber man's rate out, and make it the same on the cooerage rate, they can get two cents off his price, that is my point.

Mr. GLASGOW. I would like to have the gentleman work that out a little more definitely.

Mr. COLEMAN. We will after lunch. You said you complied with all the safety appliance laws?

Mr. BARRON. Yes, sir.

Mr. COLEMAN. And that you spent \$6,500 to put ash pans on two engines?

Mr. BARRON. No.

Mr. GLASGOW. Let us be fair among ourselves.

Mr. COLEMAN. I wanted to know.

Mr. BARRON. No; I said the expense of complying with the safety appliance acts amounted to anyhow \$6,500.

Mr. COLEMAN. What did you do to comply with it?

Mr. BARRON. Well, we put air brakes on; something like 115 and 120 vehicles.

Mr. COLEMAN. I see by this picture you have no air brakes on those cars at all.

Mr. BARRON. No; you do not see anything of the kind.

Mr. COLEMAN. Well, show me them.

Mr. BARRON. I am not going to show them. They are there all right; like the drummer's overcoat.

Mr. GLASGOW. You find them.

Mr. COLEMAN. You can not find them, either; they are not there.

Mr. GLASGOW. That is a puzzle picture. You find the air brakes.

Mr. COLEMAN. How many ash pans did you put on these engines?

81 Mr. BARRON. We did not put any ash pans on. I said that we had complied with the safety appliance acts down to the furnishing of the ash pans.

Mr. COLEMAN. That was all you did?

Mr. BARRON. No; I did not say that was all we did.

Mr. COLEMAN. Well, we don't seem to connect up, for some reason.

Mr. BARRON. I mean to say that our engines have got the ash pans that you can dump without having the fireman go underneath it. The equipment is fixed that way. It is also fixed with air brakes, and we put them on, and it cost something between \$5,000 and \$6,000 to do that thing alone. They are also equipped with the required steps and grab irons and hand brakes, and the tops of the box cars have got these running boards on.

Mr. COLEMAN. That is all.

Mr. COWAN. Just one question. The cooperage that is shipped from your manufacturing establishment principally goes to New York and New Orleans?

Mr. BARRON. Yes, sir; principally. It goes to other points, but most of it goes to those two points.

Mr. COWAN. That is because the owner of the mill, or the practical owner, consumes the cooperage at the sugar manufacturing plants in the vicinity of those two places?

Mr. BARRON. Yes, sir. Now, those cooperage rates were made in 1899, before the organization of the Butler County Railroad or the participation by the railroad in the rate, and they are the same now as they were then.

Examiner BURCHMORE. Where did those rates apply from then?

Mr. BARRON. They applied from Linstead.

82 Examiner BURCHMORE. Well, but does not Linstead take the Poplar Bluff rate?

Mr. BARRON. Yes, sir; and those rates are the same as the Poplar Bluff rates. They are the Poplar Bluff rates; that is what they are.

Commissioner HARLAN. Is your railroad paying dividends?

Mr. BARRON. No, sir; it has paid in the five years one dividend of four per cent but it ought not to have paid that.

Commissioner HARLAN. It could have paid it? It did pay it?

Mr. BARRON. It had borrowed some money, and did not spend all that it had borrowed, and it had that surplus and paid a dividend with it, and afterwards it had to borrow more. We have had to borrow some \$15,000 to \$20,000 to pay our bills in the last two years.

Commissioner HARLAN. You file your reports with the commission, I believe?

Mr. BARRON. Yes.

Commissioner HARLAN. That shows your surplus account, if you have any?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Will you state, please, what is the population of Poplar Bluff?

Mr. BARRON. About 8,000.

Mr. GLASGOW. I want you also to state to the commission whether this man Palmer that you spoke of, who made this contract or agreement with one of the roads for trackage—he sold out all his interests there to the Brooklyn Cooperage Company afterwards.

Mr. BARRON. Mr. Palmer owned the land in 1899 and made that contract in his own name. In 1902 he sold all his land to the Brooklyn Cooperage Company.

83 Mr. GLASGOW. So, at the time the contract was made which has been referred to, Palmer owned the lands?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. And he afterwards sold those lands to the Brooklyn Cooperage Company?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. Will you please tell us what is the width of the right of way of the Butler County Railroad?

Mr. BARRON. 100 feet.

Mr. GLASGOW. Have you had accidents on that road for which you have been under the Missouri statute applicable to carriers?

Mr. BARRON. Yes, sir.

Mr. GLASGOW. How many?

Commissioner HARLAN. We will not stop on the details of that. If you have been held, that covers the question. It is not necessary to go into detail.

Mr. BARRON. Yes, sir; we have been held for that, for litigated contests.

Commissioner HARLAN. You have so stated.

Mr. GLASGOW. One more question. Your company is engaged in extending its road as the development requires in that community?

Mr. BARRON. Yes, sir. We have in contemplation at the present time the extension of the road ten miles south into Arkansas.

Mr. GLASGOW. A further extension of the Butler County Railroad?

Mr. BARRON. Yes, sir.

Commissioner HARLAN. Did Mr. Palmer own that land in his own right or as trustee?

Mr. BARRON. In his own right.

(Witness excused.)

Whereupon at 1.00 p. m., a recess was taken until 2.00 p. m.

EXHIBITS.

*Exhibit No. 1.**Time table No. 1.*

(Cancels Time Table No. 3.)

Mixed.	Mixed.	Mixed.	Mls.	Station.	Mixed.	Mixed.	Mixed.
4.20 p. m.	8.30 a. m.	9.50 a. m.	0	Lve. LINSTEAD Arr.	2.55 p. m.	8.20 a. m.	4.15 p. m.
4.30	8.40	10.24	8	LOWELL JCT.	2.20	8.10	4.00
4.35	8.50	10.40	9	Marshall	2.15	8.00	3.55
4.42	8.57	10.50	10	ROSSVILLE	2.05	7.50	3.48
4.45	9.00	11.05	13	Batesville	1.55	7.45	3.45
4.52	9.07	11.15	14	Bailey	1.45	7.38	3.38
4.55	9.10	11.30	16	Nyssa	1.35	7.35	3.35
4.58	9.15	11.40	17	Quercus	1.30	7.32	3.32
5.00 p. m.	9.20 a. m.	11.50	19	ULMUS	1.00 p. m.	7.30 a. m.	3.30 p. m.
		11.55 a. m.	20	Arr. Melville Lve.			
.....	9.30 a. m.	1.02 p. m.	0	Lve. Melville Arr.	12.15 p. m.	.....	3.15 p. m.
.....	9.35	1.10	1	ULMUS	12.05	.....	3.10
.....	9.55	1.30	5	Celtis	11.50 a. m.	.....	2.50
.....	10.05	1.50	8	Hicoria	11.20	.....	2.35
.....	10.15 a. m.	2.00 p. m.	10	Arr. Menorkenut Lve.	11.00 a. m.	.....	2.15 p. m.

Exhibit No. 2.

Photograph showing a train on the Butler County Railroad made up of the various characters of equipment owned by that road.

*Exhibit No. 3.**Statement of passenger earnings.*

YEAR ENDING JUNE 30, 1910.

Period.	No. pas- sengers.	Revenue.	Average per month.	
			Passengers.	Revenue.
July 1, '09, to April 15, '10.....	7,826	\$3,412.90	824	\$359.26
April 16, '10, to June 30, '10.....	3,493	1,393.04	1,397	567.21

FIVE MONTHS ENDING NOVEMBER 30, 1910.

	July.	August.	Sept.	Oct.	Nov.	Total.	Avg. per mo.
No. passengers.....	1,245	1,309	1,392	1,861	1,727	7,534	1,507
Revenue.....	\$459.20	\$501.92	\$517.46	\$701.25	\$628.38	\$2,808.21	\$561.64

*Exhibit No. 4.**Traffic furnished by the mill owned by the same interests that own the railroad.*

Commodity.	July, 1909.			August, 1909.			September, 1909.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs.....	441	6,677	\$1,335	551	8,265	\$1,653	533	7,995	\$1,599
Cooperage.....	43	1,061	533	58	1,451	760	50	1,218	637
Machinery.....							5	137	63
Coal.....	3	82	40				3	82	38
Total.....	487	7,820	1,908	609	9,716	2,413	591	9,432	2,332

All other traffic.

Commodity.	July, 1909.			August, 1909.			September, 1909.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs and bolts.....	143	2,907	\$1,098	114	2,291	\$950	53	1,081	\$499
Lumber.....	23	522	488	13	336	262	18	516	407
Piling and ties.....	77	1,465	1,074	84	1,770	1,348	95	1,679	1,209
Mill stuffs.....	5	76	78	3	46	51	2	32	35
Live stock.....	1	9	10						
Ice.....	2	40	28	1	20	16	2	55	44
Beer.....				1	11	23			
Household goods.....							2	23	45
Total.....	251	5,119	2,771	216	4,474	2,650	172	3,365	2,220
Grand total.....	738	12,939	4,679	825	14,190	5,063	763	12,797	4,572

Commodity.	October, 1909.			November, 1909.			December, 1909.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs.....	553	8,295	\$1,659	536	8,040	\$1,608	495	7,425	\$1,485
Cooperage.....	48	1,150	617	66	1,719	859	62	1,592	732
Machinery.....	1	27	17	2	55	33	3	82	50
Coal.....	3	93	37	2	55	22			
Total.....	605	9,565	2,330	608	9,869	2,522	560	9,099	2,267

Commodity.	October, 1909.			November, 1909.			December, 1909.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs and bolts.....	76	1,539	\$462	174	3,568	\$1,070	165	3,334	\$1,000
Lumber.....	44	1,142	848	43	1,242	949	43	1,174	1,005
Piling and ties.....	57	1,042	833	118	2,212	1,761	69	1,359	1,067
Mill stuffs.....	2	29	35	3	47	53	2	36	37
Live stock.....				2	17	21			
Cotton.....	5	29	58	2	10	21	3	18	35
Cottonseed.....	3	65	91	2	40	57			
Household goods.....							1	10	20
Vegetables.....							2	25	50
Total.....	187	3,846	2,327	344	7,136	3,940	285	5,956	3,224
Grand total.....	792	13,411	4,657	952	17,005	6,462	845	15,055	3,501

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All other traffic—Continued.

Commodity.	January, 1910.			February, 1910.			March, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs.....	604	9,060	\$1,812	342	6,840	\$1,368	650	9,750	\$1,950
Coonage.....	53	1,365	718	59	1,524	645	62	1,561	781
Machinery.....	1	27	17	3	82	50			
Coal.....				3	82	33	4	110	44
Total.....	658	10,452	2,547	407	8,528	2,096	716	11,421	2,775

Commodity.	January, 1910.			February, 1910.			March, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs and bolts.....	201	4,033	\$1,210	208	4,270	\$1,282	216	4,608	\$1,383
Lumber.....	41	1,213	805	43	1,230	911	38	1,581	1,136
Piling and ties.....	81	1,455	1,164	67	1,189	951	169	2,976	2,381
Mill stuffs.....	5	88	88	2	39	40	6	110	119
Live stock.....	1	9	10	2	22	24	2	17	21
Cotton.....	2	9	19						
Beer.....							1	12	25
Household goods.....	1	10	15				1	10	18
Vegetables.....							1	15	26
Hay.....	1	10	14	2	25	35			
Total.....	333	6,827	3,416	324	6,775	3,243	454	9,331	5,109
Grand total.....	991	17,279	5,963	731	15,303	5,339	1,170	20,752	7,884

Commodity.	April, 1910.			May, 1910.			June, 1910.			Total for fiscal year ending June 30, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs.....	580	8,700	\$1,740	506	7,590	\$1,518	46	695	\$139	5,837	89,332	\$17,860
Coonage.....	78	2,070	989	88	2,316	1,076	46	1,168	1,168	715	18,195	9,515
Machinery.....	2	100	60				3	106	162	20	616	472
Coal.....				3	75	30				21	579	239
Total ..	660	10,870	2,789	597	9,981	2,624	95	1,969	1,469	6,593	108,722	28,092

Commodity.	April, 1910.			May, 1910.			June, 1910.			Total for fiscal year ending June 30, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs and bolts.....	245	4,975	\$1,492	275	5,501	\$1,650	326	6,570	\$1,971	2,196	44,657	\$13,960
Lumber.....	51	1,359	1,023	59	1,557	1,183	57	1,023	1,115	493	12,996	10,217
Piling and ties.....	143	2,627	2,102	66	1,114	911	38	620	496	1,064	19,508	15,415
Mill stuffs.....	2	43	32	5	88	75	2	40	43	39	674	684
Live stock.....				1	9	10	1	11	14	10	94	110
Cotton.....										12	66	133
Cottonseed.....										5	105	148
Ice.....				1	25	35				6	140	123
Beer.....										2	23	45
Household goods.....												
Vegetables.....										5	53	99
Hay.....	3	30	42	1	10	14	1	10	15	3	40	76
Total ..	444	9,034	4,691	408	8,304	3,878	425	8,274	3,654	3,843	78,441	41,133
Grand total ..	1,104	19,904	7,480	1,005	18,285	6,502	520	10,243	5,123	10,436	187,163	69,225

*Exhibit No. 5.**Traffic furnished by the mill owned by the same interests that own the railroad.*

Commodity.	July, 1910.			August, 1910.			September, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs.....	200	3,000	\$700	498	7,510	\$1,506	456	9,035	\$1,811
Cooperage.....	43	1,119	801	57	1,393	1,596	62	1,555	1,172
Machinery.....	7	185	125	3	90	81	3	75	90
Coal.....	1	42	17	10	400	120	2	93	27
Iron.....							3	80	95
Total.....	251	4,346	1,633	568	9,395	3,003	526	10,838	3,195

Commodity.	October, 1910.			November, 1910.			Total for 5 months ending Nov. 30, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs.....	467	8,951	\$1,814	437	8,040	\$1,008	2,058	36,536	\$7,339
Cooperage.....	71	1,868	1,654	82	2,210	1,727	315	8,147	6,740
Machinery.....	1	30	27	2	60	54	16	440	377
Coal.....	11	354	106	19	857	342	43	1,746	612
Iron.....				9	235	518	12	315	613
Total.....	550	11,203	3,601	549	11,402	4,249	2,444	47,184	15,681

All other traffic.

Commodity.	July, 1910.			August, 1910.			September, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs & bolts.....	200	5,279	\$1,572	227	4,528	\$1,258	240	5,745	\$1,723
Lumber.....	66	1,708	1,509	68	1,661	1,460	64	1,588	1,450
Piling & ties.....	29	593	513	31	517	418	36	692	567
Mill stuffs.....	6	96	107	4	80	72	2	53	47
Live stock.....	1	12	15	2	22	24			
Cotton.....									
Cotton seed.....									
Ice.....	1	37	16						
Beer.....									
Household goods.....									
Salt.....	2	39	26						
Hay.....							1	11	16
Total.....	365	7,724	3,756	332	6,808	3,232	343	8,080	3,793
Grand total.....	616	12,070	5,389	900	16,203	6,235	809	18,927	6,988

Commodity.	October, 1910.			November, 1910.			Total for 5 months ending Nov. 30, 1910.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Logs & bolts.....	223	5,300	\$1,592	275	6,408	\$1,954	1,225	27,229	\$8,009
Lumber.....	73	1,999	1,923	88	* 2,443	* 2,283	359	9,399	8,625
Piling & ties.....	52	972	860	52	* 817	* 784	200	3,591	3,132
Mill stuffs.....	1	15	18	2	39	40	15	283	284
Live stock.....							3	34	37
Cotton.....				4	* 71	* 142	4	71	142
Cotton seed.....				1	22	31	1	22	31
Ice.....							1	37	16
Beer.....									
Household goods.....									
Salt.....							2	39	26
Hay.....	1	10	15				2	21	31
Total.....	350	8,305	4,408	422	9,800	5,234	1,812	40,726	20,423
Grand total.....	900	19,508	8,009	971	21,202	9,483	4,256	87,910	30,104

* Estimated.

*Exhibit No. 6.**Year ending June 30, 1910.*

	Number of cars.	Percent- age of the whole in carloads.	Number of tons.	Percent- age of the whole in tons.	Revenue earned.	Percent- age of total revenue.
Carload freight supplied by the controlling mill.....	6,593	<i>Per cent.</i> 63	108,722	<i>Per cent.</i> 37	28,002	<i>Per cent.</i> 30
All other carload freight.....	3,843	37	78,441	42	41,133	35
L. C. L. freight.....			1,240	01	4,427	06
Total.....	10,436	100	188,403	100	73,652	100

Butler Co. R. R.

Interstate Commerce Commission.
Docket No. 11 I. & S., Exhibit No. 6.
Witness..... Barron.....
Complainants. Date, 12-9-10.
Defendants. Stone, Phillips.

See p. 351.

*Exhibit No. 7.**From July 1, 1910, to Nov. 30, 1910, both inclusive.*

	Number of cars.	Percent- age of the whole in carloads.	Number of tons.	Percent- age of the whole in tons.	Revenue earned.	Percent- age of total revenue.
Carload freight supplied by the controlling mill.....	2,444	<i>Per cent.</i> 57	47,184	<i>Per cent.</i> 53	15,681	<i>Per cent.</i> 41
All other carload freight.....	1,812	43	43,726	46	20,423	33
L. C. L. freight.....			684	1	2,486	4
Total.....	4,256	100	88,594	100	38,590	100

Butler Co. R. R.

Interstate Commerce Commission.
Docket No. 11 I. & S., Exhibit No. 7.
Witness..... Barron.....
Complainants. Date, 12-9-10.
Defendants. Stone, Phillips.

See p. 351.

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*Exhibit No. 8.**St. Louis and San Francisco Railroad Company.*

Commodity.	From—	To—	Rate.	Division.	
				B. C. Ry.	Other r'ys.
Lumber.....	Poplar Bluff.....	St. Louis.....	10		
	All B. C. stations.....		12	4	8
Cooperage stock.....	Poplar Bluff.....	New York.....	35		
	All B. C. stations.....		35	3	32
Cooperage stock.....	Poplar Bluff.....	New Orleans.....	17		
	All B. C. stations.....		17	2	15
Lumber.....	Poplar Bluff.....	Cairo.....	9		
	All B. C. stations.....		11	4	7
Lumber.....	Poplar Bluff.....	Thebes.....	8		
	All B. C. stations.....		10	4	6
Lumber.....	Poplar Bluff.....	Memphis.....	10		
	All B. C. stations.....		12	4	8
Lumber.....	Poplar Bluff.....	E. St. Louis.....	11½		
	All B. C. stations.....		13½	4	9½

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*Exhibit No. 9.**Missouri Pacific and St. Louis, Iron Mountain & Southern Railroads.*

Commodity.	From—	To—	Rate.	Division.	
				B. C. Ry.	Other r'ys.
Lumber.....	Poplar Bluff.....	St. Louis.....	10		
	All B. C. stations.....		12	5	7
Cooperage stock.....	Poplar Bluff.....	New York.....	35		
	All B. C. stations.....		35	3	32
Cooperage stock.....	Poplar Bluff.....	New Orleans.....	17		
	All B. C. stations.....		17	3	14
Handle blanks.....	Poplar Bluff.....	Charleston.....	6		
	All B. C. stations.....		5½	2½	3
Lumber.....	Poplar Bluff.....	Cairo.....	8		
	All B. C. stations.....		10	5	5
Lumber.....	Poplar Bluff.....	Thebes.....	8		
	All B. C. stations.....		10	5	5
Lumber.....	Poplar Bluff.....	Memphis.....	10		
	All B. C. stations.....		12	8	7
Lumber.....	Poplar Bluff.....	East St. Louis.....	11½		
	All B. C. stations.....		13½	5	8½
Cotton.....	Poplar Bluff.....	St. Louis.....			
	All B. C. stations.....		40	10	30

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Exhibit No. 10.

Map of line of the Butler County Railroad Company and connections.

Exhibit No. 11.

Map of territory in which the Butler County Railroad is located, showing ownership of land along route.

93 *Supplementary Exhibit No. 1.*

Filed at request of Mr. Commissioner Harlan. (See Record, p. 85:)

Piling and ties, logs and lumber manufactured from logs cut by parties (other than Brooklyn Cooperage Company) on land of the Great Western Land Company, and by said parties shipped per Butler County Railroad.

[No community of proprietary interest exists between any of the said shippers and the Butler County Railroad, or any allied concern.]

Name of shipper.	Year ending June 30, 1910.								
	Logs.			Lumber.			Piling and ties.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Oil Well Supply Co.	475	9,580	\$2,874	77	2,256	\$1,839			
Garetson-Greaseon Lumber Co.	375	7,585	2,274	133	3,893	3,122			
C. H. Smith Tie & Tbr. Co.							293	6,924	\$5,538
Ed. Jacobs							734	11,261	8,795
Quercus Lumber Co.	1,062	21,110	6,478	148	3,981	3,341			
Hearne Timber Co.				2	58	47			
J. W. Putnam Mfg. Co.	284	6,426	2,342	78	2,162	1,085			
Western Tie & Tbr. Co.							33	768	606
Total	2,190	44,701	13,968	438	12,350	9,434	1,060	18,953	14,938

Name of shipper.	Five months ending November 30, 1910.								
	Logs.			Lumber.			Piling and ties.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Oil Well Supply Co.	267	5,347	\$1,004	36	1,005	\$1,005			
Garetson-Greaseon Lumber Co.				13	312	312			
C. H. Smith Tie & Tbr. Co.							72	1,814	\$1,800
Ed. Jacobs							157	2,399	1,938
Quercus Lumber Co.	960	19,220	5,766	221	5,971	5,724			
J. W. Putnam Mfg. Co.	101	2,180	654	37	905	453			
Total	1,328	26,747	8,024	307	8,193	7,494	229	4,213	3,747

Shipments of forest products were made during the same periods by—

Name of shipper.	Year ending June 30, 1910 (piling and ties).			Five months ending Nov. 30, 1910 (logs).		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
Great Western Land Co.	6	124	\$99	16	320	\$96

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Supplementary Exhibit No. 2.

Filed at request of Mr. Commissioner Harlan. (See Record, pp. 37 and 38:)

Logs, lumber, and piling and ties shipped per Butler County Railroad by parties with whom and with whose freight neither the Great Western Land Company, the Butler County Railroad, nor any associated interests had any connection.

Name of shipper.	Year ending June 30, 1910.								
	Logs.			Lumber.			Piling and ties.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
T. J. Moss Tie Co.							7	287	\$230
Columbia Hdw. Lbr. Co.				18	507	\$406			
P. & S. Lumber Co.				2	65	52			
C. Drummond.				1	24	19			
H. I. Ruth.				2	50	40			
Bank of Poplar Bluff.				3	83	66			
A. Winklebleck.				1	22	18			
Bimel-Ashcroft Mfg. Co.	1	30	\$21						
A. W. Greer.				4	65	75			
Henry Turner.				1	15	12			
Total.	1	30	21	32	831	688	7	287	230

Name of shipper.	Five months ending November 30, 1910.								
	Logs.			Lumber.			Piling and ties.		
	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.	Cars.	Tons.	Rev.
C. Drummond.				3	79	\$79			
H. I. Ruth.				3	72	72			
A. Winklebleck.				1	21	21			
A. W. Greer.				1	16	15			
Henry Turner.				3	45	36			
Frank N. Hall.				14	409	409			
B. C. Cook.	1	20	\$20						
Sincer Mfg. Co.	2	41	41						
Fullerton-Powell Lbr. Co.				2	50	40			
Vernon Thompson.				3	63	63			
Upham & Ogles.				3	89	89			
Total.	3	61	61	33	844	824			

95

Supplementary Exhibit No. 3.

Supplementary Exhibit No. 3, filed at request of Mr. Commissioner Harlan. (See Record, p. 45.)

(Copies of agreements between the St. Louis, Iron Mountain & Southern R. Co. and Lowell M. Palmer filed with commission. Not printed.)

Supplementary Exhibit No. 4.

Supplementary Exhibit No. 4, filed at request of Mr. Cowan. (See Record, pp. 61 and 62.)

(Drawing showing tracks of Butler County Railroad at Linstead, and connections with long-line railroads, also sites of Brooklyn Co-op-
erage Company's mill and mills of other industries at Linstead.)

96

Exhibit B.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of May, A. D. 1912.

Investigation and Suspension Docket No. 11.

In the matter of the investigation and suspension of schedules canceling through rates with certain tap-line connections; and certain other cases consolidated herewith.

It appearing that a full investigation of the matters and things herein involved has been had, and the Commission, on April 23, 1912, having made and filed a report containing its findings of fact and conclusions thereon, and having also on the date hereof made and filed a supplemental report containing its further findings of fact and conclusions thereon, which said reports are hereby referred to and made a part hereof;

It further appearing that the Commission has found that in the case of the following-named parties to the record, and each of them, namely:

Malvern & Freeo Valley Railway Company;

Wilmar & Saline Valley Railroad Company;

Arkansas & Gulf Railroad Company;

Little Rock, Maumelle & Western Railroad Company;

Beirne & Clear Lake Railroad;

Mississippi, Arkansas & Western Railway Company;

Bearden & Ouachita River Railroad Company;

Arkansas Eastern Railroad Company;

Blytheville, Burdette & Mississippi River Railway Company;

97 Brookings & Peach Orchard Railroad Company;

Crossett Railway Company;

Fordyce & Princeton Railroad Company;

Homan & Southeastern Railway Company;

Little Rock, Sheridan & Saline River Railway Company;

L'Anguille River Railway Company;

Ouachita Valley Railway Company;

Griffin, Magnolia & Western Railway Company;

Saline Bayou Railway Company;

Enterprise Railway Company;
 Natchez, Ball & Shreveport Railway Company;
 Black Bayou Railroad Company;
 The Bodcaw Valley Railway Company;
 Mill Creek & Little River Railway & Navigation Company;
 Red River & Rocky Mount Railway Company;
 Woodworth & Louisiana Central Railway Company;
 Freeo Valley Railroad Company;
 Natchez, Urania & Ruston Railway Company;
 Bernice & Northwestern Railway Company;
 Dorcheat Valley Railroad Company;
 Manghan & Northeastern Railway Company;
 Galveston, Beaumont & Northeastern Railway Company;
 Peach River & Gulf Railway Company;
 Riverside & Gulf Railway Company;
 Jefferson & Northwestern Railway Company;
 Beaumont & Saratoga Transportation Company;
 Angelina & Neches River Railroad Company;
 Missouri & Louisiana Railroad Company;
 Saginaw & Ouachita River Railroad Company;

98 Warren, Johnsville & Saline River Railroad Company;
 Blytheville, Leachville & Arkansas Southern Railroad Com-
 pany;

The Caddo & Choctaw Railroad Company;
 Manila & Southwestern Railway Company;
 Louisiana & Pine Bluff Railway Company;
 Mansfield Railway & Transportation Company;
 Louisiana & Pacific Railway Company;
 Roosevelt & Western Railroad Company;
 Tioga & Southeastern Railway Company;
 Louisiana Central Railroad Company;
 Monroe & Southwestern Railway Company;
 Victoria, Fisher & Western Railroad Company;
 Ouachita & Northwestern Railroad Company;
 Lake Charles Railway & Navigation Company;
 Louisiana Railway Company;
 Zwolle & Eastern Railway Company;
 Sabine & Northern Railroad Company;
 Gideon & North Island Railroad Company;
 Poplar Bluff & Dan River Railway Company;
 the service performed for the respective proprietary lumber com-
 panies in moving the logs from their respective forests to their re-
 spective mills and in moving the product from the mills to the trunk
 lines is not a service of transportation by a common carrier railroad
 and that any allowances or divisions out of the rate on account
 thereof are unlawful:

It further appearing that the following parties to the record,
 namely:

Little Rock, Maumelle & Western Railroad Company;
 Bearden & Ouachita River Railroad Company;

- Arkansas Eastern Railroad Company;
- Crossett Railway Company;
- Fordyce & Princeton Railroad Company;
- Ouachita Valley Railway Company;
- 99 Freeo Valley Railroad Company;
- Dorcheat Valley Railroad Company;
- Galveston, Beaumont & Northeastern Railway Company;
- Peach River & Gulf Railway Company;
- Riverside & Gulf Railway Company;
- Angelina & Neches River Railroad Company;
- Saginaw & Ouachita River Railroad Company;
- Blytheville, Leachville & Arkansas Southern Railroad Company;
- The Caddo & Choctaw Railroad Company;
- Manila & Southwestern Railway Company;
- Louisiana & Pine Bluff Railway Company;
- Mansfield Railway & Transportation Company;
- Lake Charles Railway & Navigation Company;
- Louisiana Railway Company;
- Zwolle & Eastern Railway Company;
- Gideon & North Island Railroad Company;

have heretofore filed with the commission petitions asking for the establishment or reestablishment of through routes and joint rates on forest products to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein and on which a full hearing has been had:

It is ordered. That said petitions, so far as they relate to rates on the products of the mills of the proprietary companies, be, and for the reasons set forth in said reports they are hereby, dismissed.

It is further ordered. That the defendants, The Chicago, Rock Island & Pacific Railway Company; St. Louis & San Francisco Railroad Company; New Orleans, Texas & Mexico Railroad Company; Beaumont, Sour Lake & Western Railway Company; St. Louis, Iron

100 Mountain & Southern Railway Company; The Texas & Pacific Railway Company; International & Great Northern Railway Company; The Missouri, Kansas & Texas Railway Company of Texas; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; The Paragould Southeastern Railway Company; Eastern Texas Railroad Company; The Kansas City Southern Railway Company; Texarkana & Fort Smith Railway Company; The Houston, East & West Texas Railway Company; Texas & New Orleans Railroad Company; Louisiana Western Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; Lake Charles & Northern Railroad Company; Vicksburg, Shreveport & Pacific Railway Company; Louisiana & Arkansas Railway Company; Louisiana Railway & Navigation Company; Gulf, Colorado & Santa Fe Railway Company; The Texas & Gulf Railway Company; Missouri & North Arkansas Railroad Company;

Illinois Central Railroad Company; Southern Railway Company; Northern Alabama Railway Company; New Orleans Great Northern Railroad Company; and Mobile & Ohio Railroad Company be, and they are hereby, authorized, on not less than three days' notice, to reopen through routes and publish joint rates with the following parties to the record, and each of them, on the products of the mills of their respective proprietary companies:

- Saline River Railway Company;
- Warren & Ouachita Valley Railway Company;
- El Dorado & Wesson Railway Company;
- Thornton & Alexandria Railway Company;
- Doniphan, Kensett & Searcy Railway;
- Fourche River Valley & Indian Territory Railway Company;
- Prescott & Northwestern Railroad Company;
- Memphis, Dallas & Gulf Railroad Company;
- 101 Crittenden Railroad Company;
- De Queen & Eastern Railroad Company;
- Central Railway Company of Arkansas;
- Gulf & Sabine River Railroad Company;
- The Sibley, Lake Bisteneau & Southern Railway Company;
- North Louisiana & Gulf Railroad Company;
- Arkansas Southeastern Railroad Company;
- Red River & Gulf Railroad Company;
- Tremont & Gulf Railway Company;
- The Nacogdoches & Southeastern Railroad Company;
- Texas Southeastern Railroad Company;
- Timpson & Henderson Railway Company;
- Shreveport, Houston & Gulf Railroad Company;
- Groveton, Lufkin & Northern Railway Company;
- Moscow, Camden & San Augustine Railway Company;
- Trinity Valley & Northern Railway Company;
- Trinity Valley Southern Railroad Company;
- Caro Northern Railway Company;
- Butler County Railroad Company;
- Deering Southwestern Railway;
- Mississippi Valley Railway Company;
- Paragould & Memphis Railway Company;
- Salem, Winona & Southern Railroad Company;
- Fernwood & Gulf Railroad Company;
- New Orleans, Natalbany & Natchez Railway Company;
- Alabama Central Railroad Company;
- Washington & Choctaw Railway Company;
- 102 Provided, the allowances or divisions out of such joint rates to be paid on the products of the mills of the said proprietary companies shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission.

It is further ordered, That, for the reasons specified in the said supplemental report, no allowances or divisions shall be made on

the products of the mills of the lumber companies owning or controlling the following companies party to the record:

Gould Southwestern Railway Company;

Kentwood & Eastern Railway Company;

Kentwood, Greensburg & Southwestern Railroad Company;

Liberty-White Railroad Company;

Natchez, Columbia & Mobile Railroad Company.

And it is further ordered, That the joint rates hereinabove authorized may be published on three days' notice to the public and to the commission, the tariffs to refer to this order by date and number, and on like notice any of the said defendants or parties to the record may republish rates on class and commodity traffic and on products of mills other than those of the respective proprietary lumber companies.

By the commission.

JOHN H. MARBLE, *Secretary*.

(SEAL.)

Exhibit B1.

REPORT OF INTERSTATE COMMERCE COMMISSION AS TO BUTLER COUNTY RAILROAD.

The Butler County Railroad Company is owned by the Brooklyn Cooperage Company, while most of the timber land which it reaches is owned by the Great Western Land Company. All 103 are subsidiary corporations of the American Sugar Refining Company, the cooperage company manufacturing chiefly sugar barrels. The railroad company was incorporated in September, 1905, and its capital stock issued and outstanding amounts to \$163,500, issued for the tracks and equipment which it then acquired from the cooperage company. It is also indebted to the cooperage company in the sum of \$50,000.

The tap line is in two disconnected sections. One connects with the Iron Mountain and the Frisco at a point in or near Poplar Bluff, Mo., known as Linstead, and extends to and into the plant of the cooperage company, which is within three-fourths of a mile of the two trunk lines. The other section is the principal track of the tap line and connects with the Iron Mountain at Lowell Junction, about 7½ miles from Poplar Bluff, running thence southward about 7 miles to a point known as Baileys, with a branch about 3 miles in length connecting with the main stem at Rossville. At Baileys a connection is made with the unincorporated tracks of the cooperage company that run through its timber and are used largely in logging operations. Over a considerable portion of this unincorporated track the tap line has a trackage right. It also enjoys the privilege of running its trains over the Iron Mountain from Lowell Junction to Poplar Bluff, for which it pays 65 cents a train-mile for 25 cars. The equip-

ment consists of 2 locomotives, 2 passenger coaches, 3 cabooses, and about 100 freight and log cars.

The timber is all hardwood and the logs are loaded on the cars by the employees of the cooperage company and hauled by its locomotives to a connection with the track of the tap line. The tap line then hauls the cars over its own rails to Lowell Junction, then 104 over the Iron Mountain to Linstead and over its own track for a fraction of a mile to the mill, where they are unloaded by the cooperage company. A charge of 1 cent to $1\frac{1}{2}$ cents per 100 pounds, amounting approximately to \$4 per car, is made by the tap line against the cooperage company for the log movement to the mill, being the regular manufacturing rate under the Missouri distance tariff. The tap line switches the loaded cars from the mill to the tracks of the Frisco or Iron Mountain, a distance in each case of less than 1 mile. It receives from the trunk lines an allowance of from 2 to 5 cents per 100 pounds. The rates from points on the tap line, including the mill at Linstead, are in all cases 2 cents higher than the rates of the trunk lines from Poplar Bluff, excepting to New Orleans and New York, where the most of the cooperage company's shipments actually move; to those points the Poplar Bluff rates apply from points on the tap line.

The traffic of the Butler County Railroad for the fiscal year ending June 30, 1910, was chiefly forest products, amounting in the aggregate to 184,688 tons, as against 2,475 tons of other freight. Of the first figure, 107,527 tons was logs and cooperage material, furnished by the controlling interests; 77,161 tons of logs, bolts, piles, ties, and lumber were moved for outsiders, but all of the timber came from lands of the Great Western Land Company. The 2,475 tons of miscellaneous freight included 1,195 tons of inbound machinery and coal for the proprietary companies. The passenger revenue for the same year was \$4,104.22. The tap line operates three mixed trains in each direction daily between Linstead, where the plant is located, and Melville, a point on the unincorporated track south of Baileys. Two of these trains are said to be used principally for passenger business.

105 There are several independent industries on the tracks of the Butler County Railroad near Poplar Bluff or Linstead which secure their timber material from the Great Western Land Company, the tap line switching their product to the trunk lines. These industries lease their factory sites from the cooperage company; and the admission appears of record that the leases were made for the purpose of securing the traffic to the tap line so that it would obtain divisions thereon. There are also a few independent producers of ties, handle bolts, etc., that team their logs to the saw-mills and ship out their products over the main track of the tap line into Lowell Junction. But such shippers pay either the local rate of the tap line in addition to the charge of the trunk line or

pay a through rate that is 2 cents higher than the rate from Poplar Bluff.

This is a striking example of the advantages that an industry can get out of a tap line that it owns and holds out as a common carrier. The sugar company, as is well known, has important refining establishments at New Orleans and New York, and it is to its interests to have all the hardwood along the Butler County Railroad made available to it. The rates to New York and New Orleans are therefore so adjusted as to induce movements to those points and restrict movements to other points.

For its service in moving the products of the cooperage company's mill to the Iron Mountain and to the Frisco, a distance of less than 1 mile, this tap line may lawfully receive out of the rate nothing beyond a reasonable switching charge, which we fix at \$1.50 per car.

106

Exhibit C.

Interstate Commerce Commission.

Investigation and Suspension Docket No. 11.

The Tap-Line Case.

Amended order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 30th day of October, A. D. 1912.

Investigation and Suspension Docket No. 11.

In the matter of the investigation and suspension of schedules canceling through rates with certain tap-line connections; and certain other cases consolidated herewith.

This matter coming on again upon a motion for an amendment of the order heretofore entered by the commission on May 14, 1912, and the commission being fully advised,

It is ordered, That the said order be, and it is hereby, modified to read as follows:

1. It appearing, That a full investigation of the matters and things herein involved has been had, and the commission, on April 23, 1912, having made and filed a report containing its findings of fact and conclusions thereon, and having also on the said 14th day of May, 1912, made and filed a supplemental report containing its further findings of fact and conclusions thereon, which said reports are hereby referred to and made a part hereof;

107 2. It further appearing, That the commission upon the record finds in the case of the following-named parties to the record, and each of them, namely;

Malvern & Freeo Valley Railway Company;
 Wilmar & Saline Valley Railroad Company;
 Arkansas & Gulf Railroad Company;
 Little Rock, Maumelle & Western Railroad Company;
 Beirne & Clear Lake Railroad;
 Mississippi, Arkansas & Western Railway Company;
 Bearden & Ouachita River Railroad Company;
 Arkansas Eastern Railroad Company;
 Blytheville, Burdette & Mississippi River Railway Company;
 Brookings & Peach Orchard Railroad Company;
 Crossett Railway Company;
 Ferdyce & Princeton Railroad Company;
 Homan & Southeastern Railway Company;
 Little Rock, Sheridan & Saline River Railway Company;
 L'Anguille River Railway Company;
 Ouachita Valley Railway Company;
 Griffin, Magnolia & Western Railway Company;
 Saline Bayou Railway Company;
 Enterprise Railway Company;
 Natchez, Ball & Shreveport Railway Company;
 Black Bayou Railroad Company;
 The Bodcaw Valley Railway Company;
 Mill Creek & Little River Railway & Navigation Company;
 Red River & Rocky Mount Railway Company;
 Woodworth & Louisiana Central Railway Company;
 Freeo Valley Railroad Company;

108 Natchez, Urania & Ruston Railway Company;
 Bernice & Northwestern Railway Company;
 Dercheat Valley Railroad Company;

Manghan & Northeastern Railway Company;
 Galveston, Beaumont & Northeastern Railway Company;
 Peach River & Gulf Railway Company;
 Riverside & Gulf Railway Company;
 Jefferson & Northwestern Railway Company;
 Beaumont & Saratoga Transportation Company;
 Angelina & Neches River Railroad Company;
 Missouri & Louisiana Railroad Company;
 Saginaw & Ouachita River Railroad Company;
 Warren, Johnsville & Saline River Railroad Company;
 Blytheville, Leachville & Arkansas Southern Railroad Company;
 The Caddo & Choctaw Railroad Company;
 Manila & Southwestern Railway Company;
 Louisiana & Pine Bluff Railway Company;
 Mansfield Railway & Transportation Company;
 Louisiana & Pacific Railway Company;
 Roosevelt & Western Railroad Company;

Tioga & Southeastern Railway Company;
 Louisiana Central Railroad Company;
 Monroe & Southwestern Railway Company;
 Victoria, Fisher & Western Railroad Company;
 Ouachita & Northwestern Railroad Company;
 Lake Charles Railway & Navigation Company;
 Louisiana Railway Company;
 Zwolle & Eastern Railway Company;
 Sabine & Northern Railroad Company;
 Gideon & North Island Railroad Company;
 Poplar Bluff & Dan River Railway Company;

that the tracks and equipment with respect to the industry of
 109 the several proprietary companies are plant facilities, and
 that the service performed therewith for the respective proprietary
 lumber companies in moving logs to their respective mills and
 performed therewith in moving the products of the mills to the
 trunk lines is not a service of transportation by a common-carrier
 railroad but is a plant service by a plant facility; and that any allow-
 ances or divisions out of the rate on account thereof are unlawful
 and result in undue and unreasonable preferences and unjust dis-
 criminations, as found in the said reports;

3. It is ordered, That the principal defendants, The Chicago, Rock
 Island & Pacific Railway Company; St. Louis & San Francisco
 Railroad Company; New Orleans, Texas & Mexico Railroad Com-
 pany; Beaumont, Sour Lake & Western Railway Company; St.
 Louis, Iron Mountain & Southern Railway Company; The Texas &
 Pacific Railway Company; International & Great Northern Railway
 Company; The Missouri, Kansas & Texas Railway Company of
 Texas; St. Louis Southwestern Railway Company; St. Louis South-
 western Railway Company of Texas; The Paragould Southeastern
 Railway Company; Eastern Texas Railroad Company; The Kansas
 City Southern Railway Company; Texarkana & Fort Smith Railway
 Company; The Houston, East & West Texas Railway Company;
 Texas & New Orleans Railroad Company; Louisiana Western Rail-
 road Company; Morgan's Louisiana & Texas Railroad & Steamship
 Company; Lake Charles & Northern Railroad Company; Vicksburg,
 Shreveport & Pacific Railway Company; Louisiana & Arkansas Rail-
 way Company; Louisiana Railway & Navigation Company; Gulf,
 Colorado & Santa Fe Railway Company; The Texas & Gulf Railway
 Company; Missouri & North Arkansas Railroad Company;

110 Illinois Central Railroad Company; Southern Railway Com-
 pany; Northern Alabama Railway Company; New Orleans
 Great Northern Railroad Company; and Mobile & Ohio Railroad
 Company be, and they are hereby, notified and required to cease and
 desist, and for a period of two years hereafter, or until otherwise
 ordered, to abstain from making any such allowances to any of the
 above-named parties to the record in respect of any such above-de-
 scribed service.

4. It further appearing that the following parties to the record, namely:

Little Rock, Maumelle & Western Railroad Company;
 Bearden & Ouachita River Railroad Company;
 Arkansas Eastern Railroad Company;
 Crossett Railway Company;
 Fordyce & Princeton Railroad Company;
 Ouachita Valley Railway Company;
 Freeo Valley Railroad Company;
 Dorcheat Valley Railroad Company;
 Galveston, Beaumont & Northeastern Railway Company;
 Peach River & Gulf Railway Company;
 Riverside & Gulf Railway Company;
 Angelina & Neches River Railroad Company;
 Saginaw & Ouachita River Railroad Company;
 Blytheville, Leachville & Arkansas Southern Railroad Company;
 The Caddo & Choctaw Railroad Company;
 Manila & Southwestern Railway Company;
 Louisiana & Pine Bluff Railway Company;
 Mansfield Railway & Transportation Company;
 Lake Charles Railway & Navigation Company;
 Louisiana Railway Company;
 Zwelle & Eastern Railway Company;
 Gideon & North Island Railroad Company;

111 have heretofore filed with the commission their several petitions asking for the establishment or reestablishment of through routes and joint rates to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein and on which a full hearing has been had:

5. It is ordered that said petitions, so far as they relate to rates on the products of the mills of the respective proprietary companies, be, and for the reasons set forth in said reports they are hereby, dismissed.

6. It further appearing that the following parties to the record, namely:

Warren & Ouachita Valley Railway Company;
 El Dorado & Wessen Railway Company;
 Thornton & Alexandria Railway Company;
 Fourche River Valley & Indian Territory Railway Company;
 Prescott & Northwestern Railroad Company;
 Crittenden Railroad Company;
 North Louisiana & Gulf Railroad Company;
 Arkansas Southeastern Railroad Company;
 Red River & Gulf Railroad Company;
 Tremont & Gulf Railway Company;
 The Nacogdoches & Southeastern Railroad Company;
 Texas Southeastern Railroad Company;
 Shreveport, Houston & Gulf Railroad Company;
 Groveton, Lufkin & Northern Railway Company;

Trinity Valley & Northern Railway Company;
 Trinity Valley Southern Railroad Company;
 Caro Northern Railway Company;
 Butler County Railroad Company;
 Deering Southwestern Railway;
 Mississippi Valley Railway Company;

Paragould & Memphis Railway Company;

112 have heretofore filed with the commission their several petitions asking for the establishment or reestablishment of through routes and joint rates to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein, and on which a full hearing has been had:

7. It is ordered, That the said principal defendants above named be, and they are hereby, required, on or before January 1, 1913, to reestablish, and for a period of two years to maintain with each of the said parties to the record last above named, the through interstate routes and joint rates in effect, in accordance with their respective tariffs filed with this commission, on April 30, 1912;

8. Provided, That the rates on yellow-pine lumber and articles taking the same rates from points on the lines of the last above-named parties to the record shall not exceed the current rates in effect from the junction point; and

9. Provided further, That the allowances or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said last-named parties to the record on the products of the mills of the said respective proprietary companies named in said report shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission, which are hereby fixed as maximum divisions or allowances thereon, until further order, the commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful.

10. It is further ordered, that in the case of the following parties to the record, by which petitions for the establishment or reestablishment of through routes and joint rates have not been filed, namely:

113 Saline River Railway Company;
 Doniphan, Kensett & Searcy Railway;
 Memphis, Dallas & Gulf Railroad Company;
 De Queen & Eastern Railroad Company;
 Central Railway Company of Arkansas;
 Gulf & Sabine River Railroad Company;
 The Sibley, Lake Bisteneau and Southern Railway Company;
 Timpson & Henderson Railway Company;
 Moscow, Camden & San Augustine Railway Company;
 Salem, Winona & Southern Railroad Company;
 Fernwood & Gulf Railroad Company;
 New Orleans, Natalbany & Natchez Railway Company;

Alabama Central Railroad Company;

Washington & Choctaw Railway Company;

the said principal defendants be, and they are hereby, authorized to reestablish the through routes and joint rates in effect, in accordance with their respective tariffs filed with this commission on April 30, 1912, subject to the terms and conditions prescribed in paragraphs 8 and 9 hereof; and provided further, that upon the failure of the principal defendants to reestablish the through routes and joint rates in effect on April 30, 1912, with the last above-named parties to the record on or before January 1, 1913, the commission will upon the filing herein of appropriate petitions therefor enter an order upon the record herein requiring the reestablishment of such through routes and joint rates.

11. It is further ordered, that in case of the failure of the principal defendants to reestablish, on or before January 1, 1913, the through routes and joint rates in effect on April 30, 1912, on traffic other
114 than the products of the mills of the respective proprietary companies in the case of any of the parties to the record first herein above named, the commission will upon appropriate petition herein enter an order requiring the establishment of such through routes and joint rates or enter upon an inquiry with respect thereto.

12. It is further ordered, That the divisions of all joint rates herein required and authorized to be reestablished on traffic other than the products of the mills of the several proprietary lumber companies shall be submitted to the commission by the parties hereto for approval.

13. It is further ordered, That in the case of the following parties to the record, namely:

Gould Southwestern Railway Company;

Kentwood & Eastern Railway Company;

Kentwood, Greensburg & Southwestern Railroad Company;

Liberty-White Railroad Company;

Natchez, Columbia & Mobile Railroad Company;

for the reasons specified in the said supplemental report no allowances or divisions shall be made on the products of the mills of the respective proprietary lumber companies.

14. And it is further ordered, That the joint rates herein above authorized or required may be published on three days' notice to the public and to the commission, the tariffs to refer to this order by date and number.

By the commission.

[SEAL.]

JOHN H. MARBLE, *Secretary.*

Washington.

(Filed in Commerce Court March 31, 1913.)

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that pages 19 to 84, both inclusive, and exhibits No. 1 and Nos. 3 to 9, both inclusive, and supplementary exhibits Nos. 1 and 2, contained in the attached printed bill and exhibits filed in the United States Commerce Court in the case of Butler County Railroad Company against United States of America, are true copies of pages 304 to 395, both inclusive, of the transcript of the stenographer's notes of the hearing on December 8, 1910, at New Orleans, Louisiana, in the proceeding entitled, "In the matter of the investigation and suspension of schedules cancelling through rates with certain tap-line connections," investigation and suspension docket No. 11, and Exhibits No. 1 and Nos. 3 to 9, both inclusive, and supplementary Exhibits Nos. 1 and 2, filed as a part of said testimony, the originals of which are now on file and of record in the office of this commission; and I further certify that Exhibit No. 2, being photograph showing a train on the Butler County Railroad made up of the various characteristics of equipment owned by that road, Exhibit No. 10, being map of line of Butler County Railroad and connections, Exhibit No. 11, being map of territory in which the Butler County Railroad is located, showing ownership of land along route, supplementary Exhibit No. 3, being copies of agreements between the St. Louis, Iron Mountain & Southern Railroad Company and Lowell M. Palmer, and supplementary Exhibit No. 4, drawing showing tracks of Butler County Railroad at Linstead and connections with long line railroads, were also filed as a part of the testimony in said case, but copies of these exhibits are not included in the exhibits hereto attached.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the commission, this 31st day of March, 1913.

(Signed) GEORGE B. MCGINTY.

Secretary of the Interstate Commerce Commission.

[Seal of

Interstate Commerce
Commission.]

116 IN THE UNITED STATES COMMERCE COURT.

BUTLER COUNTY R. R. CO., PETITIONER,	} No. 89.
<i>v.</i>	
UNITED STATES AND INTERSTATE COMMERCE COMMISSION, respondents.	

Answer of the United States.

(Filed January 29, 1913.)

Comes now the United States, respondent, by its counsel, not waiving but insisting upon the insufficiency in law of the petition, and answers as follows upon information and belief:

I.

The order of the Interstate Commerce Commission sought by this petition to be set aside and annulled, and the report of the commission rendered therewith, and the findings of fact stated in said order and report, were made upon due hearing and due investigation, an upon substantial and sufficient evidence and due consideration thereof.

II.

The Interstate Commerce Commission did not, in any particular, act unreasonably, arbitrarily, or otherwise improperly.

117

III.

The switching allowance of \$1.50 per car for transportation between the mill and the tracks of the trunk-line carriers, fixed as a maximum by the order of the Interstate Commerce Commission herein complained of, is an allowance given to the owner of goods for services rendered in connection with transportation thereof. Said allowance of \$1.50 per car was found by the commission, on substantial evidence, to be reasonable in the present instance.

IV.

Respondent denies that there was no evidence upon which the commission might properly find, as it did (23 I. C. C. at 281, 282, 283, 284, 298), that the majority of the tap lines in this territory receive no allowance whatever for plant-facility services and that to deny allowances to some while giving them to others constitutes undue and unlawful discrimination.

V.

Respondent has no knowledge or information sufficient to form a belief as to the causes which induced the trunk-line railroads to threaten to cancel their allowances to petitioner.

VI.

For the purposes of this case, respondent admits the allegations of fact in the petition which are not denied or specifically referred to above and which are not inconsistent with the findings made by the order and report of the commission.

118

VII.

And now, having fully answered the petition, this respondent prays that said petition be dismissed at the petitioner's costs and for such other and further orders as may be appropriate in the premises.

WINFRED T. DENISON,
Assistant Attorney General.

119

In the United States Commerce Court.

No. 89.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

Answer of the Interstate Commerce Commission.

(Filed February 28, 1913.)

The Interstate Commerce Commission, intervening respondent in the above-entitled cause, now and at all times saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answering says:

I.

120 That this court has no jurisdiction of the controversy, matters, and things respectively set forth in said petition, nor does it possess general equity jurisdiction to grant the relief, or any part thereof, prayed for.

II.

This respondent admits and alleges that after due and full hearing, as required by the statute, it made and filed in the proceeding known as Investigation and Suspension Docket No. 11, its original report, under date, April 23, 1912, which report is set forth in volume 23 of its printed reports (I. C. C. Rep.) beginning at page 277, and thereafter, May 14, 1912, it made and filed the supplemental report set forth in said petition and in said volume 23 (I. C. C. Rep.) beginning at page 549; that on the 14th day of May, 1912, it made and entered the order in said matter set forth in said petition.

This respondent admits that thereafter, on October 30, 1912, this respondent made and entered the amended order set forth in said petition. This respondent admits that it made the decision and report referred to in said petition and reported in its published reports, volume 17 (I. C. C. Rep.), beginning at page 338; and this
 121 respondent admits that the trunk lines withdrew their tariffs and filed new tariffs at the times and substantially in form as stated in said petition.

III.

This respondent neither admits nor denies the particular matters and things set forth in said petition regarding the organization of the several petitioning companies, and the several stockholdings set forth in said petition, nor has it any knowledge regarding the business and the amount thereof of the several petitioners or of either of them, excepting as the facts relevant and pertinent to the issue were proved in the said proceedings and matters before this respondent, in which matters the said reports and orders of this respondent were entered; and this respondent avers that the facts presented to and the conclusions reached thereon by this respondent in said investigation (I. and S. D. No. 11), regarding the said allegations contained in the petition herein, are set forth in the original report thereof, appearing in volume 23 of this respondent's published reports (I. C. C. Rep.), beginning at page 277, and in the supplemental report in said investigation reported in said volume 23, beginning at page 549, and in the several orders entered thereon; and this respondent makes said original and supplemental reports and each of them, and the orders entered thereon, a part of this answer for and as its statement of the facts in this controversy; and respondent begs leave to make the same use of said published
 122 reports in its defense herein as it could make if the original and supplemental reports and said orders respectively were each set forth in full in this answer.

IV.

This respondent denies each and every allegation in said petition which in effect or by inference alleges that this respondent in the matters aforesaid erroneously determined or decided any questions of law, or that it acted in any respect arbitrarily, or that this respondent in making said orders, or either of them, herein complained of, acted without substantial evidence produced at said hearing to support the same, or that in the making and enforcement of said orders, herein complained of, or either of them, the petitioners, or either of them, have suffered or will suffer any violation or infraction of their constitutional rights or privileges.

This respondent denies each and every allegation in said petition not herein expressly admitted, or which is contrary to the or any facts stated in this answer or in respondent's said original or supplemental reports or orders.

All of which matters and things this respondent is ready to aver, maintain, and prove as this honorable court shall direct, and prays the same advantage as to each and all the matters and things aforesaid as this respondent would be entitled to if the same were specially pleaded, or set forth by way of demurrer, or motion to dismiss the petition.

123 And having fully answered said petition, this respondent prays to be hence dismissed with its reasonable costs and charges in its behalf sustained.

INTERSTATE COMMERCE COMMISSION,
By CHARLES W. NEEDHAM, *Its Solicitor*.

CITY OF WASHINGTON,
District of Columbia, ss:

James S. Harlan, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-entitled respondent, and makes this affidavit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true as to the matters within the knowledge of the commission, and as to the other matters he believes it to be true.

JAMES S. HARLAN.

Subscribed and sworn to before me, George B. McGinty, a notary public within and for the District of Columbia, this 8th day of February, 1913.

[SEAL]

GEORGE B. MCGINTY,
Notary Public.

No. 89.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,

v.

THE UNITED STATES OF AMERICA, RESPONDENT, AND INTERSTATE COMMERCE COMMISSION, INTERVENING RESPONDENT.

Stipulation.

(Filed March 31, 1913.)

For the purpose of settling certain facts and determining the parts of the record of the evidence before the Interstate Commerce Commission in the Tap-Line case, Investigation and Suspension Docket No. 11, to be certified for use before said court in the above-entitled case, and the parts thereof that shall be printed; it is hereby stipulated and agreed by and between counsel for the respective parties as follows:

1. That in and by certain evidence before the commission, including tariffs on file with the commission, it appeared that the main-line roads in the general territory under investigation by the commission in Investigation and Suspension Docket No. 11 established and maintained rates for switching service ranging from \$1.50 per car to \$2.00 per car.

2. That in and by certain evidence before the commission it appeared that there were numerous lumber companies in the territory under investigation, in Investigation and Suspension Docket No. 11, manufacturing hardwood lumber that owned and operated logging roads, unincorporated, as a plant facility, bringing the
125 logs from the forest to the mill and delivering the products of the mills to the interchange track of the main-line railroad for shipment, and that for this service said mills did not receive any portion of the rate for the main-line haul.

3. That all of the oral testimony taken before the commission in the proceeding and investigation aforesaid, offered by and pertaining to the Butler County Railroad Company, petitioner herein, being the testimony from page 304 to page 395, inclusive, of the record before the commission, a copy of which is printed with the complainant's petition, shall be considered as part of the record in this case, and a copy of said record, from page 10 to page 42, inclusive, being statements of counsel and of Commissioner Harlan, as certified by the commission, shall also be considered as part of the record of this case.

4. That the exhibits presented and filed by the petitioner herein with the commission, being numbers 5 to 11, inclusive, and printed as a part of complainant's petition, shall also be considered as a part

of the record of this case; provided that maps and blueprints may not be printed, but the same may be used in argument by either party.

5. The original and supplemental reports of the commission and the original and supplemental orders, printed by the commission, shall be filed and used without reprinting in the record.

Counsel for petitioner reserves all and every right of objection to the consideration by the Interstate Commerce Commission, or by this court, of any facts herein, or in the report of the commission stated, not particularly related to the Butler County Railroad Company.

Washington, D. C., March 26, 1913.

W. A. GLASGOW, Jr.,
Solicitors for the Petitioner.

WINFRED T. DENISON,
For the United States.

CHAS. W. NEEDHAM,
For the Interstate Commerce Commission.

126 *Report and Supplemental Report of Interstate Commerce Commission in I. and S. Docket No. 11.*

(Filed in Commerce Court March 31, 1913.)

(Omitted in printing.)

* * * * *

298 *Order and amended order of Interstate Commerce Commission in I. and S. Docket No. 11.*

(Filed in Commerce Court March 31, 1913.)

(Omitted in printing.)

* * * * *

311 *Certified copy of testimony and exhibits before Interstate Commerce Commission.*

(Filed in Commerce Court, March 31, 1913.)

(See certificate immediately following copy of petition herein.)

312 Interstate Commerce Commission, Washington.

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of pages 10 to 42, inclusive, of the transcript of the stenographer's notes of the hearing held at New Orleans, Louisiana, on December 8, 1910, before Commissioner Harlan, in the proceeding entitled "In the matter of the investigation and suspension of schedules cancelling through rates with certain tap-line connections," Investi-

gation and Suspension Docket No. 11, the originals of which are now on file and of record in the office of this Commission.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 31st day of March, 1913.

[SEAL.]

GEORGE B. MCGINTY,

Secretary of the Interstate Commerce Commission.

313

Proceedings.

Commissioner HARLAN. Gentlemen, I wish first to suggest that all who are here representing any interest that is involved in this proceeding will be good enough to file their appearances with the reporter at some time during the day. It is desirable that the record should show just who are here and who are interested. Another thing that I would like all to observe is this: The stenographer does not know all who are here and all who may address the commission on this occasion. He suggests, and I hope you will bear it in mind when any one rises to address the commission they will first give their names to the stenographer, and it might be well to say what interest they represent.

I shall be glad now to have any suggestions as to procedure. I assume counsel perhaps have given that matter some consideration, and I would be glad to know whether the suggestions have been formulated as to how we shall proceed with this matter. Of course it is understood that the Star Grain and Lumber case is here, also all the special cases that have been filed by the tap lines. It is the purpose of the commission to make one record, which shall be considered as attached to the record in the Star Grain and Lumber case, and also will be a record for the individual cases that are to be presented.

Have counsel any suggestions to make as to how we shall proceed to make up this record?

Mr. GLASGOW. Mr. Commissioner, I represent the Butler County Railway Company. Counsel who have been representing the numerous short lines who are here have been somewhat embarrassed in making any suggestion as to procedure, because they did not know exactly what the views of the commission were in connection with this hearing. They have considered, as far as I know, both separately, as far as their lines are concerned, and generally, the subject of this inquiry; and upon one question they have appointed a committee to present a motion to your honor this morning as to a matter which occurs in the record, which I will now, if your honor will permit me, ask to have spread on the record at this time.

There has been a petition filed in this cause styled the supplemental petition of the Miller Link Lumber Company and others. As I understand the situation, the Star Grain case has been reopened for taking further evidence, and that it has been combined and consoli-

dated with the special petitions of short line roads, which have
 315 been filed with the commission, all to be heard at this time
 before your honor.

The scope of the Star Grain case was that certain complaints
 filed with the commission a petition to reestablish through routes and
 joint rates which had been withdrawn by the carrier, the Atchison,
 Topeka & Santa Fe Railway Company. Upon that inquiry the com-
 mission delivered an opinion and subsequently reopened the case or
 considered it further, taking into consideration the general question
 of division of rates between short line railroads and the trunk lines,
 and whether joint rates and through routes should be established,
 and that, as we understand it, is the inquiry that is now before the
 commission for investigation. The petition to which I have alluded
 undertakes in this inquiry to extend the investigation far beyond any
 question which was in the Star Grain case or any question made by
 the special petition. Therefore, this committee, who represent or who
 are acting for all of the counsel here, because it was inconvenient
 for them all to make the motion, desire to present this motion, which
 I will read, if your honor will permit me:

"Now come all short line railway companies and all owners of
 short line railways, cited to appear at this hearing and now
 316 move the commission to strike from the record in this cause
 all of the supplemental petition filed herein by Miller Link
 Lumber Company et al., except so much thereof as charges that the
 division of through rates between the trunk line railways and the
 short line railways is in violation of the second and third sections
 of the act to regulate commerce.

"And in order that the above motion and the reasons therefor may
 be made more specific it is further moved—

"1. That section 3 of said supplemental petition filed herein by
 Miller Link Lumber Company et al. be stricken from this record
 for the reason that by said section 3 there is thrust into this case
 questions which can not properly be considered, upon the citation
 which parties are required to answer upon a reopening of the case
 of Star Grain & Lumber Company et al. versus A. T. & S. F. Railway
 Company et al., No. 1319, and the other cases assigned for hearing
 this day therewith since by said petition it is sought to have the
 commission pass upon all 'rates of freight on lumber and sawmill
 products, now in effect from points on the lines of said railways in
 Louisiana, Arkansas, and Texas to interstate destinations in the States
 of Oklahoma, Colorado, Kansas, Missouri, Iowa, Nebraska,
 317 and other inter-state destinations' and this upon the insufficient
 and indefinite charge that such rates 'are unjust and unrea-
 sonable per se and relatively as compared to the rates of freight
 which the owners of sawmills and shippers who receive such divi-
 sions of the rates are accorded.'

"2. That section 5 of said petition should be stricken from the
 record in that it undertakes without any definite or distinct allega-
 tions of fact or without giving information as to what specific objec-

tion petitioners may have as to rates, to have this commission 'consider the entire body of rates on lumber from Louisiana, Arkansas, and Texas as well as the regulations and practices pertaining to such transportation and to the rates' and to thrust said omnibus, indefinite, and unlimited inquiry into cause No. 1319 aforesaid.

"3. That said petition undertakes to inject into this cause an inquiry into the legality or propriety of group rates, which has no place in the investigation upon which the commission is engaged in cause No. 1319 aforesaid, and especially in that there are not specific and definite allegations as to what group rates petitioner charges to be illegal and the reasons therefor, and paragraph 3 of the prayers of said petition should be stricken from the record for the 318 above reason and because same is indefinite and uncertain.

"4. That paragraph 1 of the prayers of said petition be stricken from the record, because it asks to inject into cause No. 1319 aforesaid matters which can not properly be considered therein.

"5. That paragraph No. 4 of the prayers of said petition be stricken from the record, in that it asks the commission to give notice of an omnibus 'investigation of all the interstate rates from Texas points to interstate markets on lumber and lumber products, together with the tap-line divisions and other allowances, regulations, practices, and rates applicable to the lumber and logging traffic in the same manner and to the same extent as the same subject shall be involved with respect to the rates, regulations, and practices from said points in Louisiana and Arkansas,' and the facts alleged and the section aforesaid are so indefinite that the commission can not properly base an investigation or an order thereon.

"6. That paragraph 5 of the prayers of said petition be stricken from the record as the same is too indefinite and uncertain to enable parties interested in this proceeding to understand definitely 319 the relief asked, and the commission can not properly base an investigation or order thereon.

"7. If investigation is to be had on a complaint as indefinite as the petition above referred to, then the effect thereof would be to deny to parties interested a proper hearing in that they would have no definite and specific information as to the grounds of complaint and necessarily could not prepare their defense thereto.

WM. A. GLASGOW, Jr., *Philadelphia*,

EDGAR H. FARRAR, *New Orleans*,

H. W. SEAMAN, *Chicago*,

C. L. MARSILLIOT, *Memphis*,

WALTER H. SAUNDERS, *St. Louis*,

Committee of Counsel Representing

Short Line Railroads Cited to Appear."

Now, sir, I think, and the committee think, that the case of the National Petroleum Association against Ann Arbor Railroad Company settles the question as to this petition (14 I. C. C. Reports). Your honor is no doubt familiar with the case. In that case a

petition very much of the same character as this, undertaking to charge that all the rates in a certain district were unreasonable and unjust, just as this undertakes to charge that all the rates from Texas, Arkansas, and Missouri to all the points in Colorado and the other States of the Union are unjust and unreasonable was filed, and the commission says:

"Then it must follow that we are asked by complainant to reduce by one sweeping order thousands and perhaps hundreds of thousands of rates concerning which no specific complaint has been made and not one syllable of evidence offered. To quote the language used in *Dallas Freight Bureau versus M., K. & T. Ry. Co.*, 12 I. C. C. Rep., 427: 'The case seems to have been thrown together, as if the commission only needed to have an opportunity presented to it to take favorable action. * * * We are authorized under the act to order a reduction in rates only when it is made to appear that they are unjust or unreasonable or unjustly discriminatory or unduly preferential. But inasmuch as this proceeding is undoubtedly maintained in good faith upon the belief that the commission can, within the powers conferred upon it by law, and from the evidence in this record, grant the relief prayed for, it may be well to state here some of the insuperable difficulties involved in an omnibus complaint of this nature,' and they go on to discuss it:

321 "We can make no such wholesale order as is prayed for in this proceeding. If any of these rates are excessive or operate to effect forbidden discriminations, as may be the case, they are the rates of one or more carriers against which a definite and specific complaint can be directed," and the commission in that case dismissed the complaint of the National Petroleum Company and required them to come in, as they subsequently did, with specific charges as to specific rates.

Now, the committee make this motion. We do not want to go beyond the inquiry which is legitimately and properly before the commission, and we make this motion before your honor on the record. I do not know whether your honor will feel like passing upon it at this time, but before going into any of the questions involved on that, if your honor does not pass on it, we should ask that your honor refer the motion to the commission to be passed upon before we go to the expense of going into the record on that question.

Commissioner HARLAN. Is counsel here representing the petition? I think it was filed by Judge Cowan.

Mr. COWAN. Yes, your honor.

Commissioner HARLAN. Have you any suggestions to make in response to the motion?

322 Mr. COWAN. The motion of Mr. Glasgow is to postpone the case until the allegations can be made sufficiently definite to inform the parties interested of what rates we complain, and that we shall not be permitted to inject into the case an investigation of any rates which were not embraced in the original case of the Star Grain and Lumber Company, and that we shall not investigate any ques-

tions except the questions involved in that case. As I understand Mr. Glasgow, he wants the commission and your honor to postpone the hearing of this case in order that they may ascertain whether these questions may be heard in this case, so they will not have to go to the expense of making preparation for trial. It is like the application in a criminal case for the continuance of such a trial on the ground of the absence of the witnesses, who are really in the vicinity of the courthouse. The commission under the present law has ample and complete power to investigate any matter that pertains to the matter of the complaint or the rates complained of. The act of 1910 gives the commission ample power in that particular, and it may investigate without a complaint and on its own motion. The

323 law does not require that the commission specify with the certainty of an indictment just what the subject matter is in all particulars, but only generally. I take it that the motion is without any foundation, legally speaking, because of the power conferred upon the commission by the act of Congress of 1910. The petition seeks in this case to adjust the rates for the purpose of preventing those discriminations as to which the commission made its decision in the Star Grain and Lumber case, the object being to embrace the question of reasonableness per se and the relative reasonableness of the rates, as well as matters pertaining to discrimination, to rebates, and to practices concerning the handling of traffic, the making of the application of the rates or the divisions of the rates. Whether the petition is as aptly drawn as my friend, Mr. Glasgow, might draw it, and whether it sets out in detail to inform those who are present of the matter that is intended to be reached by virtue of the petition calling the commission's attention to the situation, I do not know; I probably could have drawn it a great deal better, but it was sufficient, at least, that when the petition is served upon these gentlemen it has brought together the largest aggregation of good-looking and intelligent and wealthy gentlemen who are participating

324 in these advantages that I have ever seen, by a petition containing as little as Mr. Glasgow says it contains. It brought him down here representing a cooperage company and not a lumber company, from Philadelphia, and it seems very strange, in view of what your honor sees before you, that these gentlemen should contend that the petition was not sufficient to inform these gentlemen what the subject matter intended to be reached is about. I think the petition has ample evidence now before your honor that it has reached all the purposes of a petition that could be drawn by a Philadelphia lawyer, however much better it might be than one drawn by a gentleman from Texas.

Mr. GLASGOW. The question is not who drew the petition, but when my friend undertakes to look around over this audience and say this petition has brought them here, the truth of the business is a great many of these distinguished and good-looking gentlemen he has referred to never heard of this petition until they got here. He has misinterpreted this motion----

Commissioner HARLAN. I assume, after the compliment Judge Cowan has paid to the assemblage, that no one wants action on your motion at this time.

Mr. GLASGOW. No, sir; I do not suppose you will pass upon it now.

325 Commissioner HARLAN. We will reserve that question for the commission. I think it proper, however, to say that in addition to the notice that has been given, that the commission expects at this time to have a record that will enable it to proceed on the intimations made by the commission in the Star Grain and Lumber case. The commission has before it also the numerous petitions of particular lines which bring that same general question in issue; and in addition, the commission has suspended the action of the carriers cancelling the so-called tap line allowances, and the investigation of the propriety of the carriers in that regard is here before us. So that I may say, for the commission, and after a conference with the commission, that it hopes at this time to make a record that will be a sufficient basis for such action as may be necessary on this whole question.

Mr. GLASGOW. Do you mean of the division of rates to carriers?

Commissioner HARLAN. The division of rates and lawful allowances in all cases and in particular cases, and in the propriety of the action taken by the carriers in cancelling allowances. Now, I should regard it, and that is the view of the commission, as most un-
326 fortunate if any attitude is assumed here, either by the tap lines or by the regular lines, or by the lumber interests, that will impair the sufficiency of this record as the basis for a disposition of the whole question.

Mr. GLASGOW. I have not done that, and neither does this motion put it in that attitude. But we cannot be put in the attitude of being in any way attempting to limit the inquiry of the commission. But your honor recognizes that the question of reasonableness *per se* of rates from Texas to Louisiana and Arkansas is a very different question from what has been considered in this case, and we do ask that before you go into the questions of the breadth suggested by this supplemental petition, that if your honor does not feel like passing upon it alone before you go into it, we have that matter submitted to the commission for its order in that connection, because it opens up a breadth of examination that no commission, in my judgment, can possibly pass on in one case; it is utterly impossible. Therefore I do not think that the committee can expect your honor to pass upon it, but we do not want to go into that thing without having it submitted to your honor to consider it at your leisure.

Commissioner HARLAN. Your motion is of record, and you
327 have heard my statement made in behalf of the commission, and I think all questions growing out of the motion may be reserved for the action of the commission.

Mr. GARWOOD. In behalf of the lines which I represent, I wish to say that in view of the course of this investigation and in view of

the shortness and insufficiency of the notice of this supplemental petition, it had not occurred to us that the reasonableness of the lumber rates from the territory mentioned to the consuming territory would be considered, as to the reasonableness per se of those rates, and we are utterly unprepared with testimony to maintain those rates, if they are to be attacked. I think that I state almost a truism when I say it has never occurred to any of the main lines, the trunk lines, that here we would be called upon to meet the charge that the rates were unreasonable, and we are not prepared to do it.

Commissioner HARLAN. Let me interrupt you for a moment, Mr. Garwood. The view of the commission is, as I think I correctly interpret it, that the purpose of the supplemental petition was not to

bring before the commission the general question of the reasonableness of the lumber rates from those territories, but

only the particular question as to the reasonableness in view of the allowances made to tap lines. I assume that counsel who filed the petition is not prepared to go beyond that phase of the question of reasonableness. And it occurs to me, and I assume that it would be acceded by you, that there will be a sufficient basis here for the determining of the reasonableness of lumber rates from that point of view.

Mr. GARWOOD. As a mere collateral or incidental question—

Commissioner HARLAN. As a question growing out of the whole matter of allowances made by regular lines to tap lines, the state of those allowances, and the effect that those allowances have upon the net revenues of those carriers. I assume we will have no difficulty in proceeding upon that general basis, and I assume that counsel does not expect at this time to go beyond that.

Mr. COWAN. Your honor has correctly stated the view that we hold for the petitioners and the object of filing it. We did not expect to go into the general question of the rates per se; that is, put in the formal allegation of the petition like in the filing of an indictment.

Mr. PEIRCE. I would like to state my view of the situation in view of this supplemental petition. I think your honor has stated about as clearly as could be my own understanding of this supplemental petition. Now, the Rock Island was not a party to the Star Grain and Lumber case and has never been made a party to it, to my knowledge, and no copy of this petition has ever been served on us. Now, the situation, as I understand it, is simply this: That there has been a controversy pending in Texas by many of the Texas lumber producers that the payment of these allowances in Arkansas and Louisiana resulted in discrimination against the Texas people who were not getting these allowances directly or indirectly, and a petition was filed before the Texas commission asking that the local rates in Texas be reduced to offset these divisions in Arkansas and Louisiana; and that the Texas people have never made any contention as to the rates in and of themselves, but simply that the payment of these divisions in Arkansas and Louisiana resulted in

a discrimination, which, if removed or cancelled, satisfied their complaint. Now, when the main lines like the Rock Island and the Missouri Pacific and the others filed these petitions cancelling the divisions with the short lines, the commission suspended these
 330 cancellations; and while I have never known just precisely the theory upon which it was done, I have understood in a general way, and I think perhaps now in an authoritative way, that it was done for the purpose of determining whether these cancellations were proper or not—

Commissioner HARLAN. That is not quite the basis of the action of the commission, as I understand it. It was done because the Rock Island in a case in court had permitted or secured, or at any rate, the results were had in court as to produce a discrimination if the rest of the rates were not suspended.

Mr. PEIRCE. The noise outside, your honor, prevented me from hearing.

Commissioner HARLAN. Well, it was done as the result of a proceeding against the Rock Island in court, in which such action was taken as would result in a discrimination unless the suspension was made general.

Mr. PEIRCE. What action do you refer to?

Commissioner HARLAN. I do not think it worth while to refer to it. You were there and argued the case, as I understand. However, I do not think it worth while to go into the reasons of the com-
 331 mission in taking that action. It did take it, and this is the situation.

Mr. PEIRCE. I was just stating my understanding, and was about to conclude. The petition filed by Mr. Cowan, as stated by your honor, was simply to restate the petition of the Texas shippers, that these allowances in Arkansas and Louisiana were improper, and resulted in a discrimination, and the only effect of this petition was to raise the question squarely before the commission and put them on the record in order to be heard here on the question of the propriety of these allowances, and that that is the question that is now before the commission. After all, these lines are here, and I understand they are all here by their counsel and want to be heard, and make their cases, and the commission, after hearing the evidence, may decide that the action of the main lines in cancelling these divisions was improper, and that these lines are lines entitled to share in these rates; and if they do decide that, it seems to me the only necessary conclusion is that the petition of Mr. Cowan must be dismissed. If, on the contrary, the commission holds these divisions are improper, then, of course, they will be permanently cancelled, and in that way Mr. Cowan's petition will be satisfied and no further
 332 action than the permanent cancellation of divisions will be necessary. Now, that is the issue, as I understand it, that is to be heard by the commission here at this time.

Commissioner HARLAN. Mr. Peirce, I do not see how I can make the statement any clearer than I have endeavored to make it. You

have overlooked the second hearing in this city on the tap-line question. Now, if you will remember, the issue in the Star Grain and Lumber case was so enlarged in the second hearing as to bring before the commission the entire question of tap-line allowances, whether in Arkansas, Louisiana, or Texas, and the Rock Island, if I mistake not, was present on that occasion.

Mr. PEIRCE. Well, we were present——

Commissioner HARLAN. The commissioner certainly regards the Rock Island as being before it on this occasion.

Mr. PEIRCE. I do not think there is any question but what the Rock Island is here, and I do not think there is any question but what the Rock Island is a party to the record, and I do not want your honor to understand I am going to raise any technical objection. But at the first hearing in New Orleans the Star Grain case was set

333 down for hearing, to which the Rock Island was not a party, and also the other cases, known as the Chicago Coal and Lum-

ber cases, to which the Rock Island was a party. They were all assigned for hearing before the commission at New Orleans, in this room, and we all appeared here in those cases and introduced evidence, and the record was made one, and the evidence was treated in both cases, but separate opinions were rendered in those cases, and I do not know of any order that was ever made consolidating those cases. However, I do not desire and will not. If it becomes necessary to get in the Star Grain and Lumber case, in order to let the commission go ahead, I think we shall do it. I do not want to take any position that would in any way obstruct this proceeding, and will not do it, and if necessary, I think we would enter our appearance, if you wanted it entered, in order to proceed with this record in this case.

Commissioner HARLAN. I think probably counsel will do that: at any rate, there can be no misunderstanding. The whole tap-line question is here, and, as I understand it, counsel understands the Rock Island is a party to that question.

334 Mr. PEIRCE. I do not rise to object to the jurisdiction of the commission, but simply for the purpose of stating my understanding of the issues before the commission.

Commissioner HARLAN. If your understanding is any narrower than that, I think you are wrong. The commission understands that the tap-line question is before it in all of its aspects in this hearing, and we expect a record to be made, and we want the cooperation of everyone in making a record that will enable the commission to dispose of that question.

Mr. PEIRCE. Well, you say the tap-line question, in all of its aspects, and I take it that is the propriety of making the divisions to the tap lines in each and all of the cases.

Commissioner HARLAN. The propriety of making the divisions generally and in individual cases, and also the question intimated very clearly by the commission in the Star Grain and Lumber case,

whether there ought not to be a reduction of the rate, so that the matter may rest on the net revenues of the carriers.

Mr. PEIRCE. Yes, sir. Now, if the position of the commissioner is correct, that there ought to be a readjustment of the rates if the tap-line divisions are cancelled, it is impossible for us to give any consideration to that question until after the tap-line question is
335 settled, because we do not know what divisions you are going to allow or what you are not going to allow, and it is impossible for us to give any consideration to that, and impossible for us to introduce any evidence on that, because we do not know what the decision of the commission is ultimately going to be after you hear the evidence of all these gentlemen here as to their individual roads. You may decide, after you hear the evidence, that the situation will remain as it is to-day. If you do, I take it there would not be any readjustment of the rates under the intimation of the commission in the Star Grain and Lumber case, and I do not see how the commission could very well expect us to introduce evidence on the question of the readjustment of rates on the assumption that tap-line divisions are cancelled, because we do not know what the commission is going to decide, and we do not know what the result of that phase of the controversy is going to be.

Commissioner HARLAN. Well, I assume, Mr. Peirce, that there will be abundant opportunity before the commission to present your views on this particular question as well as on the general question, and I can see that on any suggestion made by counsel that this question will be considered by the commission. As to whether it
336 is desirable to have your line introduce further testimony, all these matters can come forward for decision by the commission after we have made this record.

Mr. GLASGOW. Your honor's statement of what is here to-day is practically satisfactory to us, so far as I am concerned; that is, all the questions involved in the allowances to tap lines are to be considered. We make our motion, and I expect we will have an opportunity for hearing on that. We are not complaining of the breadth of this petition as filed as a supplemental petition at this time. That is reasonably satisfactory. Now, not as a member of the committee, but as counsel for a single client, I want to suggest to your honor as to the method of procedure. The tariffs have been filed in the case I particularly represent by the St. Louis & San Francisco, and by the Missouri Pacific, cancelling the former rates in effect from points on the Butler County Railroad to destination, and putting in effect new rates, which new rates are an increase over the rates formerly paid, or under the tariffs cancelled out. The petition was filed by the Butler County Railroad Company attacking the cancelling tariffs
337 as unjust and unreasonable, and asking for joint rates and through routes in division of the rates between the two carriers, alleging that the Butler County Railroad Company is a common carrier. Now, upon that petition, and I take it that the others are practically the same, the first inquiry arises as to whether the tar-

iffs which your honors have suspended and whether the rates thereunder, are reasonable and just, and upon that the burden of proof is upon the railway companies to justify what is an increased rate. That is a matter of procedure now. Second, the question comes up whether there shall be joint rates and through routes and divisions thereof. The question arises on the threshold whether the Butler County Railroad is a common carrier, and if so, what should be the rates and divisions thereof, and therefore, I suggest to your honor that the question of procedure now shall be, first, that as to the tariffs which have been suspended, and the reasonableness of the increased rates which have been filed, that the carriers should now assume the burden of establishing the justness of the rates which are increased, for the service rendered.

Commissioner HARLAN. Where is the Butler County Railroad?

Mr. GLASGOW. It runs from a place called Poplar Bluff in either Arkansas or Missouri——

338 Mr. JEFFERY. In Missouri.

Mr. GLASGOW. To a connection with the Iron Mountain and the Frisco road, for about thirty-five miles towards the Arkansas line in a general way south.

Commissioner HARLAN. Have you had allowances heretofore?

Mr. GLASGOW. We do not state it that way.

Commissioner HARLAN. I do not want to commit you, but we want to get along. Did you get something from the regular lines?

Mr. GLASGOW. We got a division of the through rates.

Commissioner HARLAN. Very well; call it what you like; division or allowance; that is what you got?

Mr. GLASGOW. Yes.

Commissioner HARLAN. Now, the new tariffs cancelled that?

Mr. GLASGOW. Yes, sir.

Commissioner HARLAN. And at the same time raised the rates?

Mr. GLASGOW. Put in the rate from the junction the same as it was from the Butler County Railroad, which is an increased rate on shipments from the Butler County Railroad.

Commissioner HARLAN. Then you stand practically as all the other lines here?

Mr. GLASGOW. I think so.

339 Commissioner HARLAN. And on that question the commission understands that the regular lines, in pursuance of the intimations by the commission in the Star Grain and Lumber case, filed these tariffs cancelling the allowances. Now, these tap lines filed their petitions asking for their restoration. We want all the information that we can get on that question from the particular carriers, and we are not going to stop very long this morning to determine the question of where the burden of proof is, or whether it is an increased rate or not.

Mr. GLASGOW. I am trying to bring out of this chaos some method of procedure.

Commissioner HARLAN. I do not think there is any chaos.

Mr. GLASGOW. I am talking about the chaos we had yesterday, when your honor was not here, because there was a great variety of opinion as to what we were to do. Now, I suggest, in order to try to get along—I am not trying to obstruct anything——

Commissioner HARLAN. I assume you are not.

Mr. GLASGOW. What I say is that the petition attacks the rates which are now filed as unreasonable, and when that question comes up, I suggest the burden would be upon the carriers to proceed with the inquiry. When it comes to the question of the allowance or division of rates, or whether the joint rates should be established, the individual short line must proceed to present its case.

Commissioner HARLAN. That has been understood.

Mr. GLASGOW. And I merely suggest that as the method of procedure.

Commissioner HARLAN. We are trying to make a record on the general question, and not on the individual cases.

Mr. PEIRCE. Right on that point, we are not parties to the Butler County case——

Mr. GLASGOW. Yes; you are.

Mr. PEIRCE. If we are, then that serves as an illustration. I do not understand in these petitions filed by the short lines, any question is raised as to the reasonableness of rates. Those petitions are filed asking the restoration of through rates, and, therefore, Mr. Glasgow is wholly wrong and illogical in his position, in stating that any burden of proof rests upon the main carriers here to establish the reasonableness of an increased rate. They did not increase the rate, but merely cancelled a through rate with one of their connections, in view of this understanding of the intimation of the commission in the Star Grain case, and now that short line comes and says to the commission that the main line has improperly cancelled that through rate, and we ask the restoration of the through rate, but the only question now is whether that cancellation was improperly made, and if the commission finds it was improperly made, then I take it that the through rate will be immediately reestablished in accordance with whatever the finding of the commission may be.

Commissioner HARLAN. Mr. Peirce, I do not understand there is any substantial difference between your view and that suggested by Mr. Glasgow and the view I have endeavored to express for the commission. We shall not at this time discuss whether the 24-cent rate from Texas to Kansas City is or is not a reasonable rate. We shall at this time expect to make a record which will enable the commission to determine whether any part of that rate is to go to the tap line as a general proposition, and to the particular tap line that contests that rate as a particular proposition.

Mr. PEIRCE. That is exactly as I understand it.

Commissioner HARLAN. Now, there can be no misunderstanding as to what we are here for.

342 Mr. PEIRCE. I agree fully with that, and will proceed on that line.

Mr. McRAE. I represent the Prescott & Northwestern Railroad, and we have filed a complaint against the St. Louis, Iron Mountain & Southern, and against the Kansas City & Southern Railway Company for the cancellation of the rates. We are among the first on the docket, and I would ask of your honor, if you have determined the order in which these special complaints shall be heard. We are here with our witnesses, prepared to give the commission such information as we have touching our transportation question.

Commissioner HARLAN. Mr. McRae, before taking up that question, I want to make an addition, Mr. Peirce, to the statement I last made, which was incorporated in some remarks I had previously made on the question of the reasonableness of the rate, to the extent that the rate may be unreasonable because of the allowances or divisions being made to tap lines, that question of reasonableness is before us, but no other question. I have stated that in several different ways, and in making my last statement I neglected to complete it by calling attention again to that phase of the matter which the commission believes is now before it.

343 Mr. JEFFERY. Do I understand from that that for instance the 18-cent rate from the lumber territory to St. Louis will be attacked and the burden on us to defend that 18-cent rate as it stands? I am doing this sincerely, because I could not quite get your idea on that point.

Commissioner HARLAN. I am going to ask counsel to confer with other counsel on that point.

Mr. JEFFERY. I will do that, but I did not understand.

Commissioner HARLAN. I set it forth as clearly as I could, and I am going to leave the question now with this assemblage, and let us go ahead.

Mr. GLASGOW. Some of the gentlemen here have not filed petitions for their specific lines, and I think it would clarify the subject if your honor would state, as I suppose is the rule, that they may introduce evidence as to their lines without having formally filed a complaint.

Commissioner HARLAN. It was so understood with counsel representing a number of these lines at Washington, that they need not burden the record with separate petitions, but that every one here that wanted to go into this record would have liberty to do so without a formal petition. We have assigned first for hearing 344 the case of the Red River & Gulf Railroad against the Rock Island. That case went into court, and was referred by the court to the commission, and we thought it desirable, under these conditions and as a courtesy to the court, that that case be disposed of first. I would like to know who is here representing that road.

Mr. FARRAR. We represent the Red River & Gulf, but I think your honor is mistaken in saying the court referred that case to the com-

mission. The appeal was dismissed voluntarily, because the defendant came in and pleaded—

Commissioner HARLAN. Aside from the question, we have assigned that case first, and if you are ready to go ahead we will go ahead with this.

Mr. MARSILLIOT. Mr. Commissioner—

Mr. FARRAR. It will be necessary for us to send out and get our books and papers.

Commissioner HARLAN. I hope counsel will be ready when their case is called. I make no criticism of this particular case, but I hope hereafter all books and papers and witnesses will be on hand when the case is called.

Mr. FARRAR. We would have been ready, but my client's train was delayed.

Mr. MARSILLIOT. In order that we may facilitate the movement of the commission and carry out the suggestion your honor has just made, and which we think was a most excellent one, I would like to repeat Mr. Glasgow's question as to whether or not your honor has fixed any order that these cases may be set, in order that we may be ready, and all of us may be ready as fast as they are called.

Commissioner HARLAN. We will have to develop this thing a little later. We want to get started and then be able to make some announcement that will relieve a good many of those who are here perhaps until to-morrow.

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Order.

(Entered Dec. 16, 1913.)

United States Commerce Court.

No. 89.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER.

VS.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE COMMISSION, INTERVENER.

In the above entitled cause, an order having been entered allowing an appeal to the Supreme Court of the United States from the final order or decree of the United States Commerce Court entered November 28, 1913, and the clerk having been directed to transmit to the Supreme Court a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered:

Now, pursuant to section 2 of the act of June 18, 1910, it is hereby ordered that the clerk shall transmit to the Supreme Court from the files of the Commerce Court the original certified copy of pages 10

to 42, inclusive, of the transcript of the stenographer's notes of the hearing held at New Orleans, Louisiana, on December 8, 1910, before Commissioner Harlan, in the proceeding entitled "In the matter of the investigation and suspension of schedules canceling through rates with certain tap line connections," investigation and suspension docket No. 11, which certified copy was filed in the Commerce Court on March 31, 1913.

By the court,

MARTIN A. KNAPP,
Presiding judge.

347 *Certified copies of certain agreements and bond from records of Interstate Commerce Commission.*

(Filed Apr. 1, 1913.)

INTERSTATE COMMERCE COMMISSION.

WASHINGTON.

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of five agreements between the St. Louis, Iron Mountain & Southern Railway Company and Lowell M. Palmer, and one bond filed in the proceeding entitled "In the matter of the investigation and suspension of schedules canceling through rates with certain tap-line connections." Investigation and Suspension Docket No. 11, and forming part of the original records now on file in the office of this commission.

Seal of the Interstate Commerce Commission. In testimony whereof I have hereunto subscribed my name and affixed the seal of the commission this 1st day of April, 1913.

GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

348 These articles of agreement, made and entered into, in duplicate, this day of , A. D. 1899, by and between the St. Louis, Iron Mountain & Southern Railway Company, a consolidated railway corporation, organized and existing under the laws of the States of Missouri, Arkansas, and Louisiana, hereinafter, for brevity, described as the Railway Company, party of the first part, and Lowell M. Palmer, of the city and State of New York, party of the second part:

Whereas the said party of the second part has constructed a logging road from a point known as Lowell Junction, on the Cairo Branch of the St. L., I. M. & S. Ry., extending south a number of miles into the timber; said party of the second part having also constructed a cooperage plant adjacent to said Cairo Branch of the St. L., I. M. & S. Ry. near Poplar Bluff in Butler County, State of Missouri, a distance of about seven (7) miles from the intersection

of said logging road aforesaid; the said party of the second part being desirous of obtaining from the party of the first part permission to operate his logging trains from his said branch over the track of the party of the first part between Lowell Junction in Butler County, State of Missouri, and the coopeage plant of the party of the second part, near Poplar Bluff, Missouri, a distance from Lowell Junction to said coopeage plant, known as "Palmer Mill," of seven and one-fourth ($7\frac{1}{4}$) miles:

Now, therefore, license or permit is hereby granted to the said party of the second part to run his said trains between Lowell Junction and Palmer Mill for the purpose of transporting rough lumber and other material for the use of said mill:

349 That agreement further witnesseth:

That for and in consideration of one dollar (\$1.00) in hand paid to the Railway Company by the party of the second part, receipt of which is hereby acknowledged, and other valuable considerations hereinafter enumerated, that is to say, the further stipulations and agreements to be faithfully kept and performed by said party of the second part, the said Railway Company hereby gives to the said party of the second part for the purpose hereinafter set forth, the right to intersect or connect his tracks with those of the said Railway Company on its Cairo division near Poplar Bluff, called "Palmer Mill," near Ash Hill, called "Lowell Junction," in Butler County, State of Missouri, as shown in the attached blueprint, which plat is made a part of this agreement, together with the right of said party of the second part with his own locomotive and cars, to use said intersecting and connecting tracks and as much of the main track of the Railway Company as is necessary between "Lowell Junction" and "Palmer Mill," a distance of about seven and one-quarter ($7\frac{1}{4}$) miles more or less.

The foregoing license or permit is expressly conditioned upon the performance by the said party of the second part of each and all of the covenants and agreements hereinafter set forth to be kept and performed by him as follows, to wit:

First. The said party of the second part hereby covenants and agrees with the said Railway Company that he will pay all damages for which a legal liability may arise against either party to this contract, on account of death or injury to persons, or damage to
350 property, which may occur on, or be occasioned by the locomotives or cars of the said party of the second part, or by the negligence of his employes, or defect of his equipment, and will, upon request of the Railway Company, defend and save harmless the said Railway Company in any and all such cases. And it is covenanted and agreed between the parties to this contract that the said party of the second part shall have no cause of action against the said party of the first part for any injury to or damage sustained by any locomotive engine, car, or equipment belonging to said party of the second part while being operated upon or across the tracks of the said parties of the first and second parts; and that said party of the second part

shall be responsible to the said party of the first part for all injuries to or damages sustained by any locomotive engine, car, or equipment belonging to said party of the first part while the same is being operated upon or over the tracks of the said party of the second part hereinbefore referred to, and shall pay to said party of the first part the amount of damage sustained by it on its locomotive engine, car, or equipment.

Second. The said party of the second part hereby agrees with the said Railway Company that he will fully release and hold harmless the said Railway Company from and against all liability or claim for damages for killing, crippling, or maiming any and all live stock on the spur tracks, sidings, or main tracks of the said Railway Company, by reason of said second party operating engines or cars over said tracks.

Third. The said party of the second part further agrees to fully release, indemnify, and hold the said Railway Company
351 from all liability or claim for damages on account of fire caused by locomotives operating upon said tracks or while engaged in work connected with the use of said tracks.

Fourth. The said party of the second part hereby further agrees to be at all expense in the construction and maintenance of a station and telegraph office at "Palmer Mill" and at "Lowell Junction." The operator at "Lowell Junction" to be appointed by and under the control of the said Railway Company, and the operator at "Palmer Mill" to be appointed by and under the control of the party of the second part. It is, however, distinctly understood and agreed that the party of the second part shall pay the salary or wages of both operators, and the Railway Company will furnish wire connections, instruments, etc., at both stations. In case either operator is objectionable he may be removed by written notice of either party to the other.

Fifth. It is further mutually understood and agreed that the operation of the engines and cars of said party of the second part over the tracks of the said Railway Company shall be at all times according to the rules and regulations as may be prescribed by the proper officials of the Railway Company, and that said engines and cars shall be kept in good running order, so that said equipment shall comply with the M. C. B. rules.

Sixth. It is further understood and agreed that the conductor and engineer of the trains operating over the tracks of the said railway between "Lowell Junction" and "Palmer Mill" shall have a thorough knowledge of the rules and regulations of the said Rail-
352 way Company and must be acceptable to the superintendent of the Railway Company.

Seventh. It is further agreed that none of the tracks aforesaid shall at any time be used by the party of the second part until the conductor or engineer in charge of said train of the party of the second part has obtained a clearance of train order from the dispatcher authorizing the use of said railway company tracks.

Eighth. It is further mutually understood and agreed that the said party of the second part shall have the right to operate his engines and cars between "Lowell Junction" and "Palmer Mill" only between the hours of 6 a. m. and 6.30 p. m., and that no train shall consist of more than an engine and twenty-five (25) loaded cars. It is further understood and agreed that the said party of the second part shall switch and place all loaded or empty cars at "Palmer Mill" off the right-of-way of the said railway, and that any loaded or empty cars placed on either leg of the "Y" connection at "Palmer Mill" shall constitute a delivery.

Ninth. It is further understood and agreed that the party of the second part shall not operate his engines or cars on the main line of the said Railway Company, other than between "Palmer Mill" and "Lowell Junction," and shall not be permitted to carry any passengers other than his own employees, nor any freight for any outside party or concern.

Tenth. It is further understood and agreed that for and in consideration of the use of said Railway Company's tracks as aforesaid, the said party of the second part shall pay to the said Railway
 353 Company the sum of sixty-five cents (65c) per train mile as trackage on each train, either loaded or empty, in either direction that is moved between "Palmer Mill" and "Lowell Junction," and vice versa, said amount to be paid monthly.

Eleventh. It is mutually understood and agreed that it is the intent of the contracting parties to this agreement that the party of the second part shall furnish his own engines and equipment to handle freight between "Palmer Mill" and "Lowell Junction," and vice versa.

Twelfth. It is further mutually agreed that the operator at "Lowell Junction" shall keep a daily record of all trains and loads moved between "Palmer Mill" and "Lowell Junction"; said report or statement of account to be used in rendering bills against the said party of the second part.

Thirteenth. It is further understood and agreed between the parties hereto that any default or failure on the part of said party of the second part to keep and perform all and singular the foregoing covenants and conditions on his part, shall work a forfeiture to said Railway Company of all the rights to said party of the second part under this contract. For the faithful performance of the covenants and conditions contained in this agreement the said party of the second part shall prepare and furnish to said Railway Company a bond in the sum of twenty thousand dollars (\$20,000), with two sureties to be approved by the Railway Company.

Fourteenth. It is hereby mutually agreed and understood that this agreement shall take effect on the day and date first above
 354 written and continue in force and effect until terminated by thirty days' written notice given by either party hereto to the other.

In witness whereof the St. Louis, Iron Mountain & Southern Railway Company has caused its corporate name to be hereunto subscribed by its general manager, and the said Lowell M. Palmer has signed his name the day and year first above written.

Executed in duplicate, each an original to be considered as one and the same agreement.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
By -----

Witness :

Witness :

Approved as to form.

MARTIN L. CLARDY, *General Attorney.*

355 This second supplemental agreement, made and entered into in duplicate this 25th day of September, A. D. 1902, by and between the St. Louis, Iron Mountain & Southern Railway Company, hereinafter for brevity designated the Railway Company, party of the first part, and Lowell M. Palmer, of the city and State of New York, party of the second part, witnesseth:

Whereas the parties hereto did, on the seventh day of September, A. D. 1899, enter into a contract for the use by the party of the second part of a part of the main line of the railway of the party of the first part between Poplar Bluff and Lowell Junction in the county of Butler and State of Missouri; and did also on the tenth day of May, A. D. 1901, enter into an agreement supplemental to said agreement dated Sept. seventh, A. D. 1899, modifying said agreement of Sept. 7th, 1899, in certain respects, and

Whereas the parties hereto desire to still further modify said agreement dated Sept. seventh, 1899, as amended by said supplemental agreement dated May tenth, 1901:

Now therefore the parties hereto have covenanted and agreed and do hereby covenant and agree each with the other as follows, to wit:

1. That the ninth paragraph of said original contract dated Sept. seventh, 1899, be, and the same is hereby, modified and amended to read as follows, to wit:

"Ninth. It is further understood and agreed that the party of the second part shall not operate its engines or cars on the main line of the said railway company, other than between 'Palmer Mill' and 'Lowell Junction,' and also between Lowell Junction and
356 Fisk, and shall not be permitted to carry any passengers other than his own employees, nor any freight for any outside party or concern, otherwise than raw material, consisting of so-called forest products for the use of the H. D. Williams Cooperage Co., located at Poplar Bluff, Mo., or for the use of the other vendees of said

party of the second part who are engaged in the manufacturing of said raw material into lumber or other finished product, located at Poplar Bluff, Missouri; Palmer Mill, Mo.; Lowell Junction, Mo.; Ash Hill, Mo.; Fisk, Mo.; or at any other point on the line of railway of said party of the first part in Butler County, Mo.; said cars of forest products designed for the use of the H. D. Williams Cooperage Co. or of other vendees of said party of the second part located at Poplar Bluff, Mo., to be delivered to the St. Louis, Iron Mountain and Southern Ry. Co. at Palmer Mill, to be switched to the H. D. Williams Cooperage Co.'s plant or to the plant or plants of such other vendees of said party of the second part at Poplar Bluff, in consideration of the usual switching charge."

2. That said contract, dated Sept. seventh, 1899, as amended by said first supplemental agreement, dated May tenth, 1901, and by this second supplemental agreement, shall be and remain in full force and effect during the full term of a certain contract in writing entered into between the parties hereto on the 25th day of Sept., A. D. 1902, relative to the extension of the logging railway of the party of the second part hereto, the removal of timber from lands owned or controlled by the party of the second part hereto in Clay County, Ark., and elsewhere, and other matters, and that to
357 that and article fourteenth of said original contract, dated Sept. seventh, 1899, be, and the same is hereby, declared to be annulled and rescinded.

3. That all the provisions and considerations in said original contract, dated September seventh, 1899, the said first supplemental agreement, dated May tenth, 1901, contained, shall be and remain in full force and effect, except as herein and hereby supplemented, modified, or annulled.

In witness whereof said party of the first part has caused its corporate name to be hereunto subscribed by its general supt., being thereunto duly authorized, and said party of the second part has hereunto set his hand the day and year first above written.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO.
By WM. COTTER, *Gen. Supt.*

LOWELL M. PALMER.

Approved as to form:

ALEX G. COCHRAN,
General Solicitor.

Approved:

RUSSELL HARDING,
3rd V. P. and G. M., St. L., I. M. & S. Ry. Co.

358 This third supplemental agreement made and entered into in duplicate this day of , A. D. 1904, by and between St. Louis, Iron Mountain and Southern Railway Company (hereinafter for brevity designated the Railway Company), party of the first part, and Lowell M. Palmer, of the city and State of New York, party of the second part, witnesseth:

Whereas the parties hereto did, on the 7th day of September, A. D. 1899, enter into a contract for the use by the party of the second part of a part of the main line of the railway of the party of the first part between Poplar Bluff and Lowell Junction, in the county of Butler and State of Missouri; and did also on the 10th day of May, A. D. 1901, and on the 25th day of September, A. D. 1902, respectively, enter into several agreements supplemental to said agreement dated September 7th, A. D. 1899, in certain respects; and

Whereas, the parties hereto desire to still further modify said agreement dated September 7th, 1899, as amended by said supplemental agreements dated May 10th, 1901, and September 25th, 1902, respectively;

Now therefore, for and in consideration of the sum of one dollar (\$1.00) in hand paid by said party of the second part to the Railway Company, the receipt whereof is hereby duly acknowledged, the parties hereto have covenanted and agreed, and do hereby covenant and agree, each with the other, as follows, to wit:

1. That the eighth paragraph of said original contract dated September 7th, 1899, be, and the same is hereby, modified and amended to read as follows, to wit:

359 " Eighth. It is further mutually understood and agreed that the party of the second part shall have the right to operate his engines and cars between 'Lowell Junction' and 'Palmer Mill,' and between 'Lowell Junction' and 'Fisk' only between the hours of six (6) a. m. and six thirty (6:30) p. m., and that no train shall consist of more than an engine and forty-five (45) loaded cars. It is further understood and agreed that the said party of the second part shall switch and place all loaded or empty cars at 'Palmer Mill' off the right of way of said railway, and that any loaded or empty cars placed on either leg of the 'Y' connections at the 'Palmer Mill' shall constitute a delivery."

2. That the tenth paragraph of said original contract dated September 7th, 1899, be and the same is hereby modified and amended to read as follows, to wit:

" Tenth. It is further understood and agreed that for and in consideration of the use of said Railway Company's tracks, as aforesaid, said party of the second part shall pay to the said railway company the sum of sixty-five (65) cents per train mile as trackage on each train, either loaded or empty, consisting of an engine and not more than twenty-five (25) cars, in either direction, that is moved between Palmer Mill and Lowell Junction, or between Lowell Junction and Fisk, or vice versa; that the said party of the second part shall pay to the said railway company the sum of seventy-five (75) cents per train mile as trackage on each train, either loaded or empty, consisting of an engine and more than twenty-five cars and not more than thirty-five (35) cars, in either direction, that is moved between Palmer Mill and Lowell Junction, or between Lowell Junction and Fisk, or vice versa; that said party of the second part shall pay to

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the said Railway Company the sum of eighty-five (85) cents per train mile as trackage on each train, either loaded or empty, consisting of an engine and more than thirty-five (35) and not more than forty-five (45) cars, in either direction, that is moved between Lowell Junction and Palmer Mill, or between Lowell Junction and Fisk, or vice versa; all settlements to be made monthly."

That all the provisions and considerations in said original contract, dated Sept. 7, 1899, and said first and supplemental agreements dated May 10, 1901, and September 25, 1902, respectively, contained shall be and remain in full force and effect, except as herein and hereby supplemented, modified or annulled.

360 In witness whereof, said party of the first part has caused its corporate name to be hereunto subscribed by its being thereto duly authorized, and said party of the second part has hereunto set his hand, the day and year first above written.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

By LOWELL M. PALMER.

Approved as to form:

ALEX. G. COCHRAN, *General Solicitor,*

St. Louis, Iron Mountain & Southern Ry. Co.

Approved:

-----, *Vice President and General Manager,*

St. Louis, Iron Mountain and Southern Ry. Co.

361 This supplemental agreement made and entered into, in duplicate, this 10th day of May, 1901, by and between the St. Louis, Iron Mountain and Southern Railway Company, hereinafter for brevity designated as the Railway Company, party of the first part, and Lowell M. Palmer, of the city and state of New York, party of the second part, witnesseth:

That, whereas, the parties hereto, on the 7th day of September, 1899, entered into a contract (copy of which is hereto attached) for the use by the party of the second part of a part of the main line of the railway of the party of the first part, from Poplar Bluff to Lowell Junction; and

Whereas, the party of the second part desires to use the main line of the Railway Company from Lowell Junction to Fisk, a distance of about two and nineteen one-hundredths miles and said Railway Company is willing to grant said party of the second part said privilege, on the following conditions, viz:

That the party of the second part will pay a flat rate of four dollars per train of twenty-five cars or less, for all trains hauled over its track between said Lowell Junction and Fisk (round trip);

And said party of the second part agrees to erect at his own expense a suitable station building at Fisk, and pay the salary of a telegraph operator to be there stationed;

And all the provisions and conditions contained in said contract of the 7th of September, 1899, shall apply with equal force to this con-

tract, which is intended merely as a supplemental contract to said original contract aforesaid.

362 Executed in duplicate.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y. CO.
By J. M. HERBERT, *General Superintendent*.
LOWELL M. PALMER.

Approved as to form:

MARTIN L. CLARDY, *General Attorney*.

Approved:

R. HARDING,

3rd Vice-Pres. & Gen. Manager St. L. I. M. & S. Ry.

363 This agreement made and entered into in duplicate this 25th day of Sept., A. D. 1902, by and between Lowell M. Palmer, of the city of New York, State of New York, party of the first part, and St. Louis, Iron Mountain and Southern Ry. Co., a consolidated corporation organized and existing under the laws of the State of Missouri and Arkansas, party of the second part;

Whereas said party of the second part did, on or about the 25th day of Sept., A. D. 1902, by its warranty deed, convey unto said party of the first part, his heirs and assigns for ever, about seven thousand eight hundred and twenty-six and 31/100 (7,826-31/100) acres of land, more fully described in said deed, lying and being situated in the county of Clay and State of Arkansas, for the sum of three dollars and sixty-two and one-half cents (\$3.62½) per acre, in hand paid to said party of the second part by said party of the first part, and for other valuable considerations; and

Whereas the other valuable considerations were the undertaking of said party of the first part to enter into a contract in writing with said party of the second part in relation to the removal of standing timber now upon the lands conveyed by said deed and other covenants of said party of the first part herein contained; and

Whereas said parties are now ready to enter into such contract:

Now therefore this agreement witnesseth that for and in consideration of the sum of one dollar (\$1.00) each to the other in hand paid, the receipt whereof is hereby duly acknowledged; and

364 in further consideration of the covenant and obligations hereinafter undertaken to be kept and performed by the parties hereto, the parties hereto have covenanted and agreed, and do hereby covenant and agree, each with the other, as follows, to wit:

1. The party of the first part covenants and agrees that he will, without cost or expense to the party of the second part, extend or cause to be extended the logging railway now built and in operation from Lowell Junction, on the Cairo branch of the railway of said party of the second part, southwardly to a point at or near the southeast corner of section thirty-six (36), township twenty-four (24) north, range seven (7) east, heretofore known as Bailey's End, in the county of Butler, State of Missouri, said railroad being owned and operated by the party of the first part from its present terminus

as aforesaid to a point in the county of Clay and State of Arkansas not less than thirteen (13) miles south of the boundary line between the States of Missouri and Arkansas, measured at right angles to said boundary line.

2. Said party of the first part further covenants and agrees that he will deliver to said party of the second part for transportation over its own and connecting lines of railway, at Palmer's Mill, Poplar Bluff station, Lowell Junction station, Ash Hill station, Fisk station, or other points on the line of railway of said party of the second part in said Butler County, all the logs, timber, shooks, staves, heading, and other forest products, whether in natural or manufactured state, originating along the line of the logging railway now owned and operated by said party of the first part, or
 365 along the extension of said logging railway to be constructed in accordance with the terms of this agreement, or any other or further branches or extensions of said logging railway, or elsewhere, when manufactured at the mill or mills of said party of the first part, so far as the routing of said logs, timber, lumber, shooks, staves, heading, and other forest products may be within his control; and said party of the first part covenants and agrees that he or his vendees of the forest products of said land will deliver to said party of the second part for transportation over its own and connecting lines of railway not less than two thousand five hundred (2,500) loaded cars of logs, timber, lumber, shooks, staves, heading, and other forest products during each year that this agreement shall remain in effect, and said party of the first part further covenants and agrees to deliver to said party of the second part for transportation over its own and connecting lines of railway all other freight of any description whatsoever originating along the line of said logging railway, or the extension thereof to be constructed under the terms of this agreement or any other or further branches or extensions of said logging railway, or which may be shipped to said party of the first part at Poplar Bluff or Palmer's Mill, Mo., the routing of which may be within his control.

3. The party of the first part further covenants and agrees that he will prosecute the work of removing the standing timber from the lands in Clay County, Ark., conveyed to him by the party of
 366 the second part on or about the 25th day of September, A. D. 1902, as aforesaid, and from all other lands east of Black River in said county or adjoining counties adjacent or tributary to said logging railway, or any branches or extensions thereof as aforesaid owned or controlled by him, with due diligence and with all reasonable despatch. Said party of the first part further covenants and agrees that he will exercise all reasonable diligence to procure and facilitate the settlement of development of said lands and of all other lands owned or controlled by said party of the first part in the county of Clay and State of Arkansas or elsewhere adjacent or tributary to said logging railway and any branches or extensions thereof

as aforesaid as fast as the standing timber shall be removed from said lands and the same rendered fit for settlement and cultivation.

4. It is further covenanted and agreed by and between the parties hereto that a certain contract in writing entered into between said parties on the seventh day of September, A. D. 1899, relative to the operation of the engines and cars of said party of the first part over the line of railway of said party of the second part hereto between Lowell Junction, on the Cairo branch of the St. Louis, Iron Mountain and Southern Railway, and the cooperage plant of the party of the second part near Poplar Bluff, Mo., known as "Palmer's Mill," a distance of seven and one-fourth ($7\frac{1}{4}$) miles, and a certain agreement supplementary thereto entered into on the tenth day of May, A. D. 1901, shall be continued and remain in full force and effect until all standing timber shall have been removed from the lands in Clay County, Ark., conveyed to said party of the first part by said party of the second part, as hereinbefore stated, and from all other lands in said Clay County, Ark., or elsewhere adjacent or tributary to said land or to said logging railway or any branches or extensions thereof owned or controlled by said party of the first part.

In witness whereof said party of the first part has hereunto set his hand and said party of the second part has caused its corporate name to be hereto subscribed by its _____ this the day and year first above written.

Witness:

H. L. UTTER.

LOWELL M. PALMER.

St. Louis, Iron Mountain & Southern Ry. Co.

Witness:

E. S. CRONK.

By C. G. WARNER, 2nd V. P.

368 Know all men by these presents, That we, Lowell M. Palmer,
as principal, and and as sureties, are
held and bound unto the St. Louis, Iron Mountain & Southern Rail-
way Company, in the sum of twenty thousand dollars (\$20,000) for
the payment of which well and truly to be made, we do bind our-
selves, our and each of our heirs, executors, administrators, suc-
cessors, and assigns, sealed with our seals, this day of
A. D. 1899.

The condition of the above obligation is such that, whereas, the said Lowell M. Palmer did, on the _____ day of _____, 1899, make and enter into an agreement in writing, with the said St. Louis, Iron Mountain & Southern Railway Company, for the operation of engine and cars between "Palmer Mill" and "Lowell Junction," in consideration whereof said Lowell M. Palmer covenanted and agreed to do and perform divers and sundry things, and to pay to the said St. Louis, Iron Mountain & Southern Railway Company divers and sundry sums of money, as by reference to said contract will more fully and at large appear.

Now, if said Lowell M. Palmer shall well and truly keep and perform all and singular his obligations, covenants, and agreements as provided by said contract to be by him kept and performed, and shall well and truly pay all moneys as by him agreed to be paid, according to terms, conditions, and provisions of said contract, then this obligation shall be void; otherwise to be and remain in full force and effect.

369 In the United States Commerce Court.

Butler County Railroad Company, petitioner,	} No. 89
<i>v.</i>	
United States of America, respondent.	

Objections to the sufficiency of the petition on final hearing.

(Filed March 31, 1913.)

Comes now the United States of America, by its counsel, on the final hearing hereof, and in accordance with the statute in such case made and provided, makes and enters the following objections to the sufficiency of the petition in the above-entitled cause, viz:

First. The court is without jurisdiction to entertain the said petition, because the order of the Interstate Commerce Commission sought to be set aside is a negative order;

Second. The court is without jurisdiction to review the action of the Interstate Commerce Commission in refusing to establish through routes and joint rates between the petitioner and the trunk lines;

Third. The petition does not state any cause of action against the respondent.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

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Journal Entry.

Proceedings of March 31, 1913.

Case No. 89.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE
COMMISSION, INTERVENER.

Said cause came on for the taking of testimony, and William N. Barron being duly sworn as a witness, counsel for the petitioner proceeded with his examination. Thereupon counsel for the United States objected to the taking of testimony; and counsel for the Interstate Commerce Commission interposed its objections to each question as put to the witness. Thereupon the court stated that it was in doubt as to the relevancy of the testimony, but would permit the witness to proceed and reserve decision as to the relevancy of his testimony. Thereupon said cause came on for final hearing and the arguments of counsel were concluded, Mr. William A. Glasgow, jr., appearing on behalf of the petitioner, Mr. Blackburn Esterline, special assistant to the Attorney General, on behalf of the United States, and Mr. Charles W. Needham, on behalf of the Interstate Commerce Commission. Leave was granted to counsel to file briefs. Thereupon the cause was taken under advisement by the court.

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Opinion.

(November 26, 1913.)

United States Commerce Court.

No. 89.—February session, 1913.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE
COMMISSION, INTERVENER.

On final hearing.

(For opinion of Interstate Commerce Commission see 23 I. C. C. Rep., 277 and 549.)

Mr. William A. Glasgow, jr., for the petitioner.

Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. Charles W. Needham, for the Interstate Commerce Commission.

Before Knapp, presiding judge, and Hunt, Carland, and Mack, judges.

(November 26, 1913.)

Mack, Judge:

Complaints filed by this petitioner against several trunk lines, requesting that joint rates and through routes theretofore in force be reestablished, were made a part of the Interstate Commerce Commission's investigation and suspension docket No. 11. The reports and orders of the commission in those proceedings are fully considered in our opinion filed this day in cases No. 90 to 93.

The finding in those orders that certain tap lines were plant facilities did not include this petitioner. As to it, as well as to a number of other tap lines not now before us, the order was as follows:

"Seven. It is ordered that the said principal defendants (the trunk lines) be and they are hereby required, on or before January 1st, 1913, to reestablish, and for a period of two years to maintain, with (the Butler County Railroad Company) the through interstate routes and joint rates in effect in accordance with their respective tariffs filed with this commission on April 30th, 1912.

"Eight. Provided, that the rates on yellow pine lumber and articles taking the same rates from points on the lines of the (Butler County Railroad Company) shall not exceed the current rates in effect from the junction points; and

"Nine. Provided further, that the allowances or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said (Butler County Railroad Company) on the products of the mills (of its proprietary company) shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission, which are hereby fixed as maximum divisions or allowances thereon until further order, the commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations, and are unlawful."

At page 629 of the supplemental report the commission says:

"For its service in moving the products of the cooperage company's (the proprietary) mill to the Iron Mountain and to the Frisco, a distance of less than one mile, this tap line may lawfully receive out of the rate nothing beyond a reasonable switching charge, which we fix at \$1.50 per car."

This is the only provision for any allowance or division in respect to the traffic of the proprietary company.

The effect of the order of the commission is to find that this tap line is a common carrier both of logs and of lumber, but while it may receive a division out of the joint rate for both the log and the lumber traffic of nonproprietary companies, it may receive neither

a division nor an allowance for the log traffic and only an allowance but no division for the lumber traffic of the proprietary mill.

For the reasons stated in the opinion filed this day in cases No. 90 to 93, we are of the opinion that the distinctions here made are arbitrary and that the order is, in this respect, beyond the power of the commission.

When the commission permits the reestablishment of a joint rate, which was applicable both to the logs and the lumber, including the milling-in-transit privilege, thereby recognizing the tap
374 line as a common carrier both of logs and lumber, it is without power to forbid the payment by the trunk line to the tap line of a reasonable division for its services both in hauling the logs to a mill, proprietary or nonproprietary, and in hauling or switching the lumber from such a mill to a trunk line. It is in such case equally without power to limit the payment in respect to the traffic of the proprietary mill to a mere allowance for switching the lumber. The proviso contained in paragraph numbered 9 of the order must, therefore, be annulled.

If the divisions theretofore in force were so excessive as to produce an unjust discrimination, or to amount to a secret rebate, the commission may reduce them to a reasonable sum, and nothing herein stated is intended in any manner to limit the power of the commission in this respect.

A decree will be entered accordingly, and it is so ordered.

375 *Opinion of Commerce Court in La. & Pacific Ry. Co. et al. vs. United States et al.*

(Filed November 26, 1913.)

(Omitted in printing.)

* * * * *

404 United States Commerce Court.

No. 89.

BUTLER COUNTY RAILROAD CO., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT, AND INTERSTATE COMMERCE COMMISSION, INTERVENER.

Final decree.

(Entered November 28, 1913.)

The above case having been submitted on final hearing upon pleadings and proofs, and due consideration thereof having been had.

It is ordered and adjudged that so much of the order of October 30th, 1912, which reads as follows:

"Nine. Provided further that the allowances or divisions out of such joint rates to be paid by said principal defendants respectively to the said last named parties to the record (Butler County Railroad Company) on the products of the mills of the said respective proprietary companies named in said report, shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission, which are hereby fixed as maximum divisions or allowances thereon until further order, the commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations, and are unlawful." be and the same is hereby vacated and set aside as to the petitioner herein.

By the court.

(Signed)

MARTIN A. KNAPP,
Presiding Judge.

NOVEMBER 28, 1913.

405 In the United States Commerce Court.

February session, 1913.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,	} No. 89.
v.	
UNITED STATES OF AMERICA, RESPONDENT, AND INTERSTATE Commerce Commission, intervening respondent.	

Petition for appeal.

(Filed November 29, 1913.)

The United States, respondent, and the Interstate Commerce Commission, intervenor, feeling themselves aggrieved by the final decree entered in the above-entitled cause on November 28, 1913, by their counsel, pray and appeal to the Supreme Court of the United States from the said final decree.

The particulars wherein the United States and the Interstate Commerce Commission consider said final decree erroneous are set forth in the assignment of errors herewith filed, to which reference is made.

And the United States, respondent, and the Interstate Commerce Commission, intervenor, further pray that a transcript of the record, proceedings, and papers on which the said final decree was made and entered, duly authenticated, may be transmitted forthwith to
406 the Supreme Court of the United States.

Washington, November 29, 1913.

J. C. McREYNOLDS,
Attorney General of the United States.

CHAS. W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

Allowed:

MARTIN A. KNAPP,
Presiding Judge, United States Commerce Court.

407 In the United States Commerce Court, February Session, 1913.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,	} No. 89.
v.	
THE UNITED STATES OF AMERICA, RESPONDENT, AND INTER- state Commerce Commission, intervening respondent.	

Assignment of errors.

(Filed November 29, 1913.)

Come now the United States of America, by its Attorney General, and the Interstate Commerce Commission, by its solicitor, and in connection with their petition for appeal file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the final order or decree of the Commerce Court, entered against them on November 28, 1913, in the above-entitled cause.

The Commerce Court erred—

I.

In not granting the motion to dismiss for want of jurisdiction, and in holding and adjudging that the Commerce Court had jurisdiction to hear and determine the cause.

II.

In holding and adjudging that the order of the Interstate Commerce Commission sought to be annulled and enjoined is an affirmative order within the power of the court to review, and in not holding and adjudging that the same is a negative order and beyond the power of the court to review.

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III.

In not dismissing the petition for that (a) the same does not set forth any cause of action, and is insufficient to warrant the relief granted, or to form the basis for any relief from the order of the commission; (b) nor has the said petitioner shown that there is any equity in the said petition upon which to grant the relief prayed, or to form the basis for any relief from the order of the commission; (c) nor has the petitioner shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred upon it by the act to regulate commerce; (d) nor has the petitioner shown that in making its said order the Interstate Commerce Commission violated any right of the said petitioner protected by the Constitution of the United States, or any other right of the said petitioner over which this court may exercise jurisdiction.

IV.

In holding that a mere switching movement could be made a part of a through route instead of holding that the switching movement was an independent movement additional to the line haul.

V.

In holding that the commission was without power to inquiry into and go behind the mere forms of organization and methods of doing business by the industrial company and the tap line, and ascertain the true facts regarding the relations between the two companies, and whether the tap line was used as a medium for securing rebates on the industrial company's traffic.

409

VI.

In holding that the commission after finding that the tap line was a medium for the payment of rebates on some of the lumber company's traffic, could not order the main-line carriers to desist from making such payments.

VII.

In not holding and adjudging that the organization of the Butler County Railroad Company and the transfer to it by the industrial company of the railway tracks and equipment was the creation of a device for the purpose of attempting to shift the old open and illegal rebating transactions between the industrial company, as shipper, and the trunk lines, as carriers, to private divisions between the Butler County Railroad Company and the trunk lines, in order to evade the provisions of the act to regulate commerce and, simultaneously, to maintain the advantages of the parties.

VIII.

In not holding and adjudging that the industrial company is making the transportation of its enormous traffic a matter of bargain and sale, and with the power wielded in controlling the routing compelled the trunk lines to make allowances to the Butler County Railroad Company, resulting in undue and illegal preferences and discriminations forbidden by the act to regulate commerce in favor of the industrial company and against other shippers.

IX.

In not holding and adjudging that the conclusions and orders of the commission are founded upon substantial evidence and are
410 not arbitrary, and in holding and adjudging that certain parts of the order of the commission are arbitrary, null, and void, as to the petitioner.

X.

In holding and adjudging that a common carrier may, as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services, as distinguished from transportation services, and at the same time holding and adjudging that the actual service rendered by the tap-line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and non-proprietary mills, and as this is held by the Interstate Commerce Commission to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

XI.

In vacating and setting aside as to the petitioner the portions of the amended order of the Interstate Commerce Commission made October 30, 1912, embraced within proviso nine, and set forth at length in the final decree herein.

XII.

In not sustaining the order of the Interstate Commerce Commission.

XIII.

In granting the relief prayed by the petitioner or a substantial part thereof.

411 Wherefore the United States and the Interstate Commerce Commission pray that the said final decree of the Commerce Court entered November 28, 1913, be reversed, annulled, and set aside, and for such other and further order as may be appropriate.

J. C. McREYNOLDS,

Attorney General of the United States.

CHAS. W. NEEDHAM,

Solicitor for the Interstate Commerce Commission.

412 In the United States Commerce Court, February Session, 1913.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT, AND INTERSTATE
Commerce Commission, intervening respondent.

No. 89.

Order allowing appeal.

(Entered November 29, 1913.)

In the above-entitled cause, the United States and the Interstate Commerce Commission, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final

decree of the Commerce Court entered November 28, 1913, and having at the same time made and filed an assignment of errors, and having in all respects conformed to law and the rules of court—

It is ordered and decreed that the said appeal be, and the same is hereby, allowed, as prayed, and made returnable thirty days from the date hereof. And the clerk is directed to transmit forthwith a properly authenticated transcript of the records, papers, and proceedings to the Supreme Court of the United States.

November 29, 1913.

MARTIN A. KNAPP,
Presiding Judge, United States Commerce Court.

413 In the United States Commerce Court.

February session, 1913.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,	} No. 89.
<i>v.</i>	
UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COM- merce Commission, intervenor.	

Præcipe for record.

To the CLERK:

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the clerk of the Supreme Court of the United States upon the appeal from the final order or decree of the Commerce Court entered November 28, 1913, and include in said transcript the following pleadings, proceedings, and papers on file or of record, to wit:

Petition and exhibits, filed December 31, 1912.

Answer of the United States, filed January 29, 1913.

Answer of the Interstate Commerce Commission, filed February 28, 1913.

Stipulation as to record before Interstate Commerce Commission, in I. and S. Docket No. 11, filed March 31, 1913.

Report and supplemental report, order, and amended order of Interstate Commerce Commission, in I. and S. Docket No. 11, filed March 31, 1913.

Certified copy of testimony and exhibits before Interstate Commerce Commission, filed March 31, 1913.

Certified extract from record of Interstate Commerce Commission, hearing at New Orleans, December 8, 1910, filed March 31, 1913.

Certified copies of certain agreements and bond from records of Interstate Commerce Commission, filed April 1, 1913.

Objections of the United States on final hearing to the sufficiency of the petition, filed March 31, 1913.

414 Opinion of the Commerce Court in the above-entitled cause, filed November 26, 1913.

Opinion of the Commerce Court in Louisiana & Pacific Railway Company et al. v. United States et al., No. 90, filed November 26, 1913.

Final decree of the Commerce Court, entered November 28, 1913.

Petition for appeal, filed November 29, 1913.

Assignment of errors, filed November 29, 1913.

Order allowing appeal, filed November 29, 1913.

Citation on appeal, filed November 29, 1913.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney General.

CHAS. W. NEEDHAM,

Solicitor for Interstate Commerce Commission.

415 *Citation on appeal.*

UNITED STATES OF AMERICA, ss:

To BUTLER COUNTY RAILROAD COMPANY, A CORPORATION.

Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States Commerce Court, wherein the United States and the Interstate Commerce Commission are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Martin A. Knapp, Presiding Judge of the United States Commerce Court, this 29th day of November, A. D. 1913.

MARTIN A. KNAPP,

Presiding Judge of the United States Commerce Court.

Service of a copy of the within citation is hereby admitted this 2nd day of December, A. D. 1913.

WM. A. GLASGOW, Jr.,

Solicitor for Appellee.

112 UNITED STATES AND I. C. C. VS. BUTLER COUNTY R. R. CO.

416 United States Commerce Court.

No. 89.

BUTLER COUNTY RAILROAD COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT; INTERSTATE COMMERCE
COMMISSION, INTERVENER.

UNITED STATES OF AMERICA, *ss.*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify that the foregoing transcript, together with the original certified copy of certain pages of the stenographer's transcript of hearing before Interstate Commerce Commissioner Harlan in Investigation and Suspension Docket No. 11, constitutes a complete record of the proceedings had and papers filed in the above entitled cause, made in accordance with the praecipe filed in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States Commerce Court this 19th day of December, A. D. 1913.

[SEAL.]

G. F. SNYDER, *Clerk.*

417 In the Supreme Court of the United States.

October Term, 1913.

UNITED STATES OF AMERICA ET AL., APPELLANTS,	} No. 837.
<i>v.</i>	
BUTLER COUNTY R. R. Co.	

Statement of errors.

To the Clerk:

In pursuance of paragraph 9, rule 10, rules of the Supreme Court, the United States, appellant, states that it intends to rely on each and all of the errors assigned.

JNO. W. DAVIS,
Solicitor General.

DISTRICT OF COLUMBIA, *ss.*

Blackburn Esterline, being duly sworn, deposes and says, that on Tuesday, January 20, 1914, he sent a true copy of the foregoing statement to William A. Glasgow, jr., Esq., Real Estate and Trust

Building, Philadelphia, Pa., by depositing the same in the post office at Washington, D. C., in envelopes addressed to each of them.

BLACKBURN ESTERLINE.

Subscribed and sworn to before me this 20th day of January, 1914.

[SEAL.]

J. H. MACKEY,

Notary Public, D. C.

I concur in the above designation.

CHAS. W. NEEDHAM,

Solicitor for Interstate Commerce Commission, appellant.

418 In the Supreme Court of the United States.

October Term, 1913.

UNITED STATES OF AMERICA ET AL., APPELLANTS,	} No. 837.
<i>v.</i>	
BUTLER COUNTY RAILROAD CO.	

Instructions to omit certain matter from the printing.

To the Clerk:

In printing the separate record in the foregoing appeal, you will please omit the following, viz:

1. The report and supplemental report and the order and the amended order of the Interstate Commerce Commission.
2. Order of Interstate Commerce Commission in Docket No. 3400, Sub. 7, I. & S. Docket No. 11-A.
3. Opinion of the United States Commerce Court in Louisiana and Pacific Railway Co. *v.* United States, No. 90.

Other instructions are separately given to print in a single volume certain parts of the matter so to be omitted.

JNO. W. DAVIS,

Solicitor General.

419 File No. 23,988. Supreme Court U. S. October term, 1913.

Term No. 837. The United States et al., appellants, vs. Butler County Railroad Company. Statement of The United States as to errors intended to be relied on and instructions to omit certain parts of the record in printing. Filed January 21, 1914.

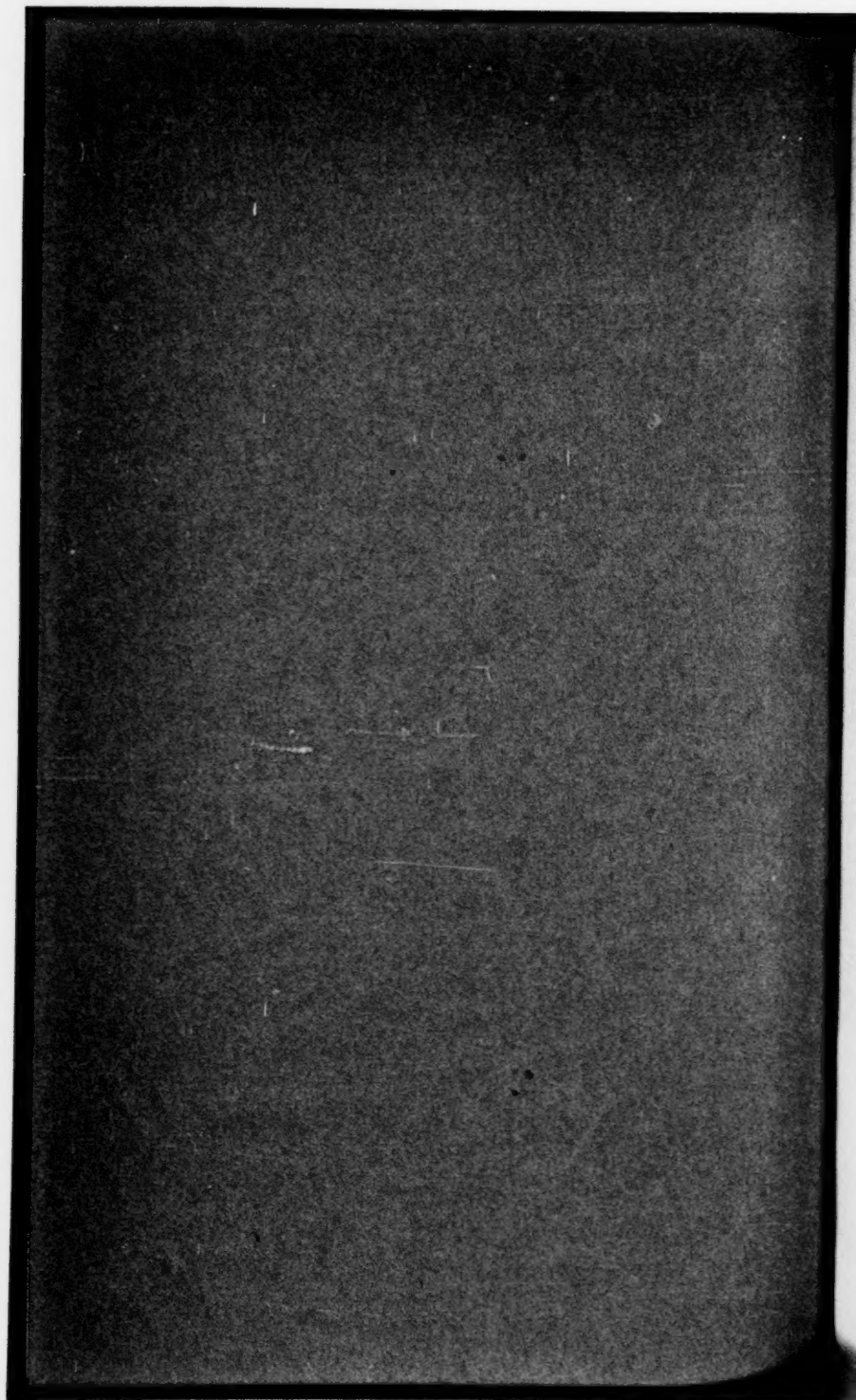
(Indorsed:) File No. 23,988. U. S. Commerce Court. Term No. 837. The United States and Interstate Commerce Commission, appellants, vs. Butler County Railroad Company. Filed December 29th, 1913. File No. 23,988.

OPINIONS OF THE COURT
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1912.

- No. 329.**
UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,
vs.
LOUISIANA AND PACIFIC RAILWAY CO. ET AL.
- No. 330.**
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.
APPELLANTS,
vs.
LOUISIANA AND PACIFIC RAILWAY CO. ET AL.
- No. 331.**
UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,
vs.
WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY ET AL.
- No. 332.**
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.
APPELLANTS,
vs.
WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY ET AL.
- No. 333.**
UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,
vs.
MANHFIELD RAILWAY AND TRANSPORTATION COMPANY ET AL.
- No. 334.**
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.
APPELLANTS,
vs.
MANHFIELD RAILWAY AND TRANSPORTATION COMPANY ET AL.
- No. 335.**
UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,
vs.
VICTORIA, FISHER AND WESTERN RAILROAD COMPANY ET AL.
- No. 336.**
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.
APPELLANTS,
vs.
VICTORIA, FISHER AND WESTERN RAILROAD COMPANY ET AL.
- No. 337.**
UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,
vs.
BUTLER COUNTY RAILROAD COMPANY.
- APPEALS FROM THE UNITED STATES COMMERCE COURT.**

FILED DECEMBER 29, 1912.

(23,980—23,987)



(23,980—23,987)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 829.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

VS.

LOUISIANA AND PACIFIC RAILWAY CO. ET AL.

No. 830.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

VS.

LOUISIANA AND PACIFIC RAILWAY CO. ET AL.

No. 831.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

VS.

WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY ET AL.

No. 832.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

VS.

WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY ET AL.

No. 833.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

VS.

MANSFIELD RAILWAY AND TRANSPORTATION COMPANY ET AL.

No. 834.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

vs.

MANSFIELD RAILWAY AND TRANSPORTATION COMPANY ET AL.

No. 835.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

vs.

VICTORIA, FISHER AND WESTERN RAILROAD COMPANY ET AL.

No. 836.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

vs.

VICTORIA, FISHER AND WESTERN RAILROAD COMPANY ET AL.

No. 837.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS.

vs.

BUTLER COUNTY RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

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INTERSTATE COMMERCE COMMISSION.

INVESTIGATION AND SUSPENSION DOCKET No. 11.

THE TAP-LINE CASE.

Submitted April 15, 1911. Decided April 23, 1912.

The common ownership of an industry and a short line serving it is not in itself sufficient to divest the railroad of its status as a common carrier. On the other hand the fact that the rails, locomotives, and cars of an industry have been turned over to an incorporated railroad company owned and operated by the industry or in its interest does not divest those appliances of their character as a plant facility if such in fact is the case. A line must be drawn at some point between what is transportation and what is industry and between a facility of transportation and a plant facility or tool of the industry. Each case, however, must stand on its own facts. On the facts shown of record; *Held*, That the service performed for the proprietary lumber companies by certain tap lines described in the report is not a service of transportation by a common carrier.

John H. Marble for Interstate Commerce Commission.

S. H. Cowan, Frank Andrews, and Andrews, Ball & Streetman for interveners.

Walter Guion, attorney general, *Ruffin G. Pleasant*, and *Wylie M. Barrow*, assistant attorneys general, for Railroad Commission of Louisiana.

R. P. Allen for Railroad Commission of Arkansas.

Robert Dunlap, T. J. Norton, and James L. Coleman for Atchison, Topeka & Santa Fe Railway System.

William A. Northcutt, Nelson W. Proctor, and Albert S. Brandeis for Louisville & Nashville Railroad Company.

James C. Jeffery for Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

E. B. Peirce for Chicago, Rock Island & Pacific Railway Company.

Fred H. Wood for St. Louis & San Francisco Railroad Company.

S. H. West for St. Louis Southwestern Railway Company.

S. W. Moore for Kansas City Southern Railway Company.

H. M. Garwood, Luther M. Walter, N. S. Brown, Sidney F. Andrews, A. Cochran, E. J. Mantooth, McRae & Tompkins, Gaughan & Sifford, Rodgers & Dorrough, Julian C. Wilson, W. C. Gilbert, Charles T. Coleman, W. M. Lewis, James M. Beck, William A. Glasgow, jr., Saner & Saner, Hill, Brizzolara & Fitzhugh, Edgar A. Bancroft,

Samuel D. Snow, John S. Kirkpatrick, W. L. Stocking, Marcellus Green, Garner Wynn Green, Frank P. Leffingwell, Walter H. Saunders, T. Brady, jr., Mixon & Cassidy, Mehaffy, Reid & Mehaffy, Thurmond & Farrar, J. W. Bishop, D. B. Holmes, Ashley Cockrill, Henry M. Armistead, J. F. Gautney, John B. Jones, C. F. Ziebold, Stubbs, Russell & Theus, J. D. Riddell, Bradley & McKay, Leon Sugar, Greer & Minor, Blair, Drayton & Hillyer, Charles H. Bates, Dean, Humphrey & Powell, Joe R. Lane, Joseph C. Rich, J. Gaillard Hamilton, and Coleman & Lewis for individual tap lines.

REPORT OF THE COMMISSION.

HARLAN, Commissioner:

An industrial railroad, as that phrase is now commonly used, is a short line constructed primarily to serve the particular plant or industry in the general interest of which it is owned and operated. It consists of the tracks connecting the various factories, warehouses, and other buildings of the industry with one another, and ordinarily has a connection with one or more adjacent trunk lines by means of a track leading from the plant to their rights of way. It serves the industry by receiving its inbound shipments of raw materials from the trunk lines at agreed interchange points, distributing them among the various buildings according to the requirements of the manufacturing operations, and by taking its finished products from the plant to the trunk lines; it is also often in a position to effect all the necessary movements of materials and partially finished products from building to building within the plant. The rails, tracks, and locomotives are more frequently operated as a bureau of the industry and no pretense is made of serving outside interests. In recent years, however, a practice has grown up under which the rails, tracks, and locomotives operated and used in and around an industrial plant, when set over to a small incorporated railroad company, organized for the purpose and owned by the industry or in its interest, are thereafter dealt with by the regular lines as something wholly apart from the industry and as if they constituted a common carrier in the service of the general public, participating on an equal basis with other carriers in the transportation of the traffic of the country. On this theory of their status many industrial lines receive allowances out of the rates both on the traffic of the controlling industry and upon such traffic of outside interests as they may handle.

The aggregate amount so paid by the regular lines to industrial lines throughout the country is not known. It has been estimated at not less than \$100,000,000 a year. On the basis of such investigations as we have been able to make it seems entirely conservative to say that they amount, for the whole country, to not less than \$50,000,000 or \$60,000,000 a year. In many cases the allowances so received out

of the rate are sufficient, and are intended both by the carrier and the industry owning the industrial line to be sufficient, to cover the cost not only of the movement of materials and finished products between the plant and the adjacent trunk lines but the cost of all the operations of the industrial lines for the industry within its plant. In no small number of cases the allowances are sufficient to meet all these costs and to return handsome dividends on the entire investment of the industry in its tracks and equipment. In some cases the amount thus received by a particular industry is so large as to contribute materially to its prosperity as compared with the prosperity of a competitor in the same line of business receiving no such aid. To a concern whose manufacturing operations are large, a contribution of this kind from the public carriers may be relatively unimportant, but similar aid to a competitor that is not so strong might readily determine in some cases whether it is to survive in the struggle or go out of existence.

The importance of the question and the numerous informal complaints of discrimination arising out of these relations between public carriers and industrial lines led the Commission several years ago to enter upon an extensive general examination of industrial lines of all classes. The investigation was closed, for the purpose of compilation, on June 30, 1909, upon a record embracing 2,208 cases where tracks and locomotives were owned and controlled and used by industries in active operation. Of that number it appeared that 1,748 were owned by affiliated industries directly or through the direct ownership of all the stock of an incorporated industrial line. In 264 cases the stockholders of the industrial line were identical with the stockholders of the controlling company. In 164 cases the industrial company, on the face of its records, owned a majority of the stock of the industrial line. Of the 2,208 industrial lines then in operation, but 611 were incorporated as railroad companies. The remaining 1,597 lines were being operated directly by the owning industrial companies. Out of the whole number, incorporated and unincorporated, only 450 were receiving divisions or allowances from the public carriers. Some 363 derived some revenues under local rates, while 1,395 derived no revenue at all from operation. Out of the whole number, but 135 were receiving, according to their own claims, as much as 20 per cent of their traffic from the general public; and there is reason to think that a careful analysis of the figures would materially modify the extent of this outside traffic. In the case of 2,073 lines 80 per cent or more of the traffic was supplied by the controlling industrial company. Of the whole number, only 441 had filed tariffs or concurrences with the Commission, as required by law, and but 345 had filed annual and monthly reports.

In the operations of manufacture and production it was first the practice to use horses and wagons for handling materials in and about the industrial plant, and in the same way to haul the raw material from the tracks of the public carrier to the plant, and to haul the manufactured product from the plant to the carrier's receiving station. Later pushcarts and handcars, sometimes moving on rails, cranes, conveyers, and other appliances were brought into use. These facilities are still to be found in many of the smaller industries. But with the combinations of capital and the concentration of manufacturing operations into large plants, railroad tracks, cars, and locomotives have become necessary to avoid delay and expense in handling the raw material into and in and about the plant, and in order to deliver the manufactured products as cheaply as possible from the plant to the carriers that move them to the markets. It can not be doubted that large economies in the cost of manufacture and production have been effected in that way. When the service is performed on rails by a bureau of the industry and with locomotives that it owns and with crews that it employs, this change in method was manifestly not a change in the thing done but simply a change in the facility used for doing the same thing. Whether the service, so far as the controlling industry is concerned, takes on another aspect when the rails and locomotives have been set over to an incorporated railroad company owned by or in the interest of the industry, and ceases to be a part of the industrial operation as was the service performed by the horses and carts and other appliances formerly used by industrial companies and still used by the smaller concerns, is a question that manifestly must depend upon the facts in each case. In a formal investigation we are now looking into the relations between the public carriers and the industrial lines affiliated with iron and steel industries, and with other manufacturing concerns located in the territory east of Chicago. A number of particular instances are also before us upon formal complaint. All these cases will be considered in due time. We propose here to examine only industrial lines affiliated with lumber companies, limiting our observations to lumbering operations in the southwest, and more particularly to those in the states of Arkansas, Missouri, Louisiana, and Texas. These small railroads, owned by or affiliated with lumber companies and commonly referred to as tap lines, although different from other lines in many respects, are generally classified as industrial railroads. The tap-line question, therefore, is simply a phase of the larger question which we have endeavored to outline in the foregoing pages. So far as it affects the lumber interests in that territory, it has been considered in a general form in *Central Yellow Pine Asso. v. V. S. & P. R. R. Co.*, 10 I. C. C., 193; *Central Yellow Pine Asso. v. I. C. R. R. Co.*, 10 I. C. C., 505; and *Star Grain* 23 I. C. C.

& Lumber Co. v. A. T. & S. F. Ry. Co., 14 I. C. C., 364; 17 I. C. C., 338. It was also considered on the special facts of the case in *Kaul Lumber Co. v. C. of G. Ry. Co.*, 20 I. C. C., 450, where the haul of logs to the mill was held to be a plant service. The matter is again before us upon further complaint and upon an exhaustive record, in which the relations between the so-called tap lines and the respective lumber companies, in the interests of which they are owned and operated, were exhaustively examined. All that is here said must therefore be understood to relate to the conditions disclosed upon this record and as having relation only to industrial lines that are owned by or affiliated with lumber companies in that particular territory.

The lumber traffic of the country in the aggregate is enormous. Allowances, however, are not universally made to the tap lines of lumber companies. Taking the industry as a whole throughout the country an allowance by a public carrier to a lumber road or tap line is the exception rather than the rule. Even in the yellow-pine forests west of the Mississippi River, which is the territory more particularly involved on the record before us, there are more tap lines receiving no allowances than there are tap lines to which such allowances are paid. To some extent the practice of making such concessions out of the rate has spread to the yellow-pine districts east of the Mississippi River and allowances are now paid to a few of those mills. The rest of the mills east of the river enjoy no allowances and formerly none were paid at all. This difference in conditions east and west of the river is doubtless reflected to some extent in the current rate of 16 cents on lumber from mills west of the river as compared with a 14-cent rate on lumber from mills east of the river to such points, for example, as Cairo; generally speaking, the rates from points west of the river seem to be higher than the rates east of the river for hauls of equal distances. In the statement of facts preceding the opinion of the court in *Illinois Central R. R. v. I. C. C.*, 206 U. S., 441, 444, the difference in the practice on the two sides of the river was explained in the following language:

The railroads west of the Mississippi make a certain allowance to the mills which have "logging roads"—that is, roads by which logs are hauled from the timber to the mills. This is called "tap-line allowance or division." * * * The mills east of the river have logging roads also, but appellants make no allowance to them. * * * There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, and it amounts to a rebate or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same.

While it is said that the allowances paid west of the river enter into and affect the general rate structure from those producing points, an examination of the tariffs does not show that the rates for hauls from

mills west of the river are uniformly higher than rates for hauls of equal distances from mills east of the river. Such discriminations as may exist, as between mills east and west of the river, do not arise so much out of the rate schedules as out of the fact, just mentioned, that a large number of the mills west of the river enjoy allowances from the trunk lines while those east of the river and the majority of those west of the river have the benefit of no such aid from the carriers.

Of the 2,208 industrial lines of all classes that were examined in the course of the general investigation referred to, it was found that some 1,251, incorporated and unincorporated, were tap lines owned by or closely affiliated with companies engaged in different parts of the country in the manufacture of lumber and forest products. Of these so-called railroads only 243 were found to be receiving allowances from the public carriers. On the other hand 1,008 were receiving no allowances of any kind. The 243 lumber companies that were beneficiaries of such contributions from the public carriers were operating, through their tap lines, 5,787 miles of track, while the tap lines of the 1,008 other mills receiving no aid from the public carriers were operating 12,358 miles of track. These figures fairly lead to the inference that it is the larger lumber companies with their larger traffic that receive allowances, while the smaller concerns are compelled to get along without such contributions from the public carriers.

These 1,251 lumber mills in different parts of the country are operated under different conditions and manufacture lumber of different kinds and classes. It must be remembered, nevertheless, that they are all in competition with one another in the general lumber markets of the country. But limiting our comments to the conditions that exist west of the Mississippi River in the three states of Arkansas, Texas, and Louisiana, where the lumber industry is confined largely to yellow pine, we find that the public carriers, at the time our investigations were brought to a conclusion, were making allowances out of the rates to 112 tap lines, while 143 tap lines were receiving no such contributions. Later in this report we shall analyze the conditions under which many of these lumber industries were conducting their operations, and shall examine into the mileage, tonnage, and motive power of their respective tap lines, and the conditions under which they were being used in the process of turning their logs into lumber. At this point it will suffice to say that 11 of the tap lines receiving no allowances had been incorporated; on the other hand 6 unincorporated tap lines were receiving allowances. The general rule, however, as heretofore stated, was to pay allowances only to the incorporated tap lines. Nevertheless, taken as a whole, the tap lines receiving no allowances are shown by the investigation to have

been operated, so far as the lumber traffic is concerned, under conditions that were substantially similar to the conditions surrounding the operation of most of the tap lines that were enjoying allowances from the public carriers. The yellow-pine lumber companies in those states compete with one another in the same general markets and under conditions that would be equal, so far as can be ascertained from the record, were it not for the fact that the carriers aid some of them with contributions out of the rates, while the majority of them bear their own burdens in conducting their lumber operations.

DISCRIMINATIONS RESULTING FROM ALLOWANCES.

That discriminations grow out of these contributions by the public carriers to certain of the lumber interests in Arkansas, Missouri, Texas, and Louisiana is apparent upon the face of the record. The allowances paid range from a minimum of three-quarters of a cent to 6 cents per 100 pounds. In the competition of carriers for the traffic allowances as high as 7 cents per 100 pounds have been paid out of a 14-cent rate, where the haul of the tap line was a matter of feet and yards while the haul of the carrier itself approximated 400 miles. The amount of the allowance seems not to be governed definitely by the extent or character of the service said to be performed by the tap line, but to result to some extent from the bargain made between the carrier and the lumber company. In one case a tap line, operating 6 miles of main line, receives allowances of 3 and 4 cents per 100 pounds, while a few miles away another tap line, operating 12 miles, receives but 1 to 2½ cents per 100 pounds, depending upon destination; in each case the public carrier performs all the service between the mill and its own tracks. It did not appear that the controlling lumber companies, the real beneficiaries of the allowance, knew of the discrimination between them until the facts were developed on the hearing. Other instances appear of record where incorporated tap lines are receiving allowances that are less or greater than the allowances paid to other incorporated tap lines performing a service that is substantially similar in extent and character and under like conditions. A number of witnesses for tap lines expressed surprise at the hearing upon learning of the larger allowances paid to other tap lines. The three principal trunk lines whose tracks extend through the territory in question are the Kansas City Southern, the Iron Mountain, and the Rock Island. As illustrating the extent of the discrimination arising out of the payment of allowances to some tap lines and the failure to make allowances to others, it is well here to state that of 27 tap-line connections of the Kansas City Southern it makes allowances to 15, while 12 receive no allowances. The Iron Mountain has junctions with 90 tap lines, to

63 of which allowances are made; the other 27 have no allowances. The Rock Island is reached by 43 tap lines. Of this number it makes allowances to 33, leaving 10 without allowances. This was the condition existing at the time of the hearing.

This difference in the treatment by carriers of lumber companies owning incorporated tap lines is one form of discrimination growing out of tap-line allowances. But there are also other forms. There is the discrimination involved in the payment of allowances to one lumber company through its incorporated tap line, while the same public carrier in the same territory refuses to make any allowance to another lumber company using a tap line that has not been incorporated, but where all the other conditions, as well as the extent of the service, the mileage, motive power, cost of operation, etc., are substantially similar. An instance of this kind is before us upon formal complaint in Docket No. 3878. This proceeding was brought by the Davis Brothers Lumber Company against the Chicago, Rock Island & Pacific Railway Company and other carriers. The complainant company was included in our general investigation and the conditions under which it conducts its lumbering operations are shown of record and are explained upon its complaint. It appears that its plant and yearly output are much more extensive than those of many other lumber companies that are receiving allowances. It has 16 miles of tap line and 5 miles of logging spurs. It operates 4 locomotives and uses 40 logging cars. It has a small amount of traffic for outsiders, a claim that can not be advanced by many of the incorporated tap lines that are receiving allowances. In its complaint it points out that all the lumber companies in this territory have long used logging roads to haul logs from their adjacent forests to their mills, and that these facilities have, until recent years, been regarded as mere adjuncts to their plants; that the Rock Island, on the pretense that tap lines become common carriers when incorporated, is making allowances to the competitors of the complainant, ranging from 2 to 3 cents per 100 pounds and even higher, while refusing such aid to the complainant which uses and always has used a logging road of the same kind, for the same purpose, and which it has operated at the same proportionate expense. A striking allegation in the complaint is that the Rock Island has offered to pay the complainant similar allowances if it would go through the form of incorporating its logging road as a common carrier, a device which the complainant regards as a mere evasion of the act, and to which it therefore has declined to resort. It is a device, however, which the record shows has been adopted by many lumber companies in this territory at the express suggestion of trunk lines which desired their traffic and advised the incorporation of their tap lines as a basis for legalizing allowances.

The tap lines that are not incorporated are operated in precisely the same way and for precisely the same purposes, so far as the proprietary lumber companies are concerned, as are the incorporated tap lines. Nevertheless the lumber companies that have not incorporated their tap lines must not only bear the entire burden of the cost of their operation but must share with the general shipping public the burden cast upon the rates by the large amounts paid by the trunk lines to lumber companies having incorporated tap lines. The aggregate figures are not available in this proceeding, but from a careful check of the information found on the record it has been estimated that the allowances paid through their incorporated tap lines to these lumber companies in Louisiana, Arkansas, and Texas amount to not less than a million and a half dollars annually. Were the facts accurately known it is said that a complete check would disclose an aggregate of from two million to three million dollars annually. Indeed, the assistant attorney-general of Louisiana, using figures prepared by the railroad commission of that state and relating to that state only, said on the argument:

The tap lines incorporated and operated as common carriers haul an annual tonnage of 4,061,876 tons of lumber. Assuming the average allowance paid the tap lines in Louisiana as 3 cents per 100 pounds, it may safely be estimated that the tap lines received \$2,437,125 as divisions from their interstate freight rates with trunk lines.

WHAT IS A TAP LINE?

Originally it was usual to refer to all the rails used in a lumber mill operation as a "logging road." But since the practice of making allowances to the lumber companies west of the Mississippi River has crept in, and more particularly within the last four or five years, the rails leading from the mill to or through the timber, and usually to a logging camp or company town, have come to be known as the main line or "tap line." The spurs radiating into the forest from that point or from other points along the main line are now usually referred to as the "logging road."

The tap lines shown on the record differ from one another in details and no description of one would be an altogether accurate description of another. It is possible, nevertheless, by a general description to give a fairly accurate impression of their physical characteristics and their relations to the proprietary lumber companies:

TAP LINES GENERALLY DESCRIBED.

Some new mills have been erected within the last four or five years. In most of these cases the tap lines were constructed in the name of an incorporated railroad company, owned, however, either by

or in the interest of the lumber company. But in the great majority of the cases on the record the present incorporated railroad company operates tracks that were originally constructed and operated directly by the lumber company as a facility in its manufacture of lumber. Later the title to them was turned over to the newly incorporated railroad company in exchange for its stock. In all these cases the railroad company is directly owned by the lumber company or in its interest. In most instances the tap line was incorporated for no other purpose than to give the lumber company the color of a legal right to receive allowances. Witness after witness, as heretofore stated, broadly and definitely admitted at the hearing that the sole object in incorporating his tap line was to obtain and legalize the allowances. For the Bernice & Northwestern a witness said:

Well, we really chartered to get the divisions; we had to charter before we could get them. We chartered in order to get the divisions.

This statement was not made under the stress of cross-examination but in reply to an inquiry as to why his road had been incorporated. It is illustrative of many similar statements made on behalf of other tap lines; they were incorporated, in other words, not to serve the public, but primarily to get an allowance. When the Rock Island lines were pushed into this territory already served by other lines it entered upon an active contest to share in the lumber traffic by offering higher allowances or divisions than the other lines were paying. A standard form of contract was prepared to which both the lumber company and its tap line were usually parties. One of its requirements was that the lumber company must route not less than 50 per cent of its traffic over the Rock Island lines. Another clause, inserted as a protection against possible future troubles and obligations, provides that in case this Commission or a state commission or any court should declare the contract unlawful or the allowances excessive, the former should at once become void, and in either event no claim for damages should result against the Rock Island. It appeared at the hearing that in many cases the lumber companies had incorporated their tap lines on the advice of the Rock Island or other public carriers serving this territory. For the Sabine & Northern Railroad, Mr. Walden said:

We incorporated because the traffic department of the Kansas City Southern advised me that it was the opinion of their legal department that they could not pay divisions * * * unless the roads were legally incorporated as common carriers, and in order to get these divisions we incorporated.

The record is filled with similar admissions by other witnesses representing other tap lines. Counsel for one trunk line in order, as he explained, to get the fact of record, said that his legal department some years ago advised the traffic department that it

would be illegal to pay an allowance or a division of any kind to an unincorporated tap line, but that it would be legal to pay a division to an incorporated tap line. Subsequently, his traffic department advised the lumber interests that had been receiving allowances that they would no longer be paid unless their lines were incorporated, and new lines were advised that they had to be incorporated.

But, generally speaking, there was no change after the tap line was incorporated, either in its physical characteristics or in the extent or nature of the service that it performed for the lumber company by which it was owned. The tracks and equipment of the lumber company were simply turned over to an incorporated railroad company and the work of the controlling industry went on precisely as it had when the tracks and equipment were operated directly by it. The only dissimilarity that exists between tap lines that receive allowances and those that do not is that the former are incorporated while the latter are not; and this dissimilarity resulted in many instances from the suggestion of the public carriers that wished to have some appearance of a legal basis for securing the traffic. In a number of cases the tap line is well built; in other cases there has been an improvement in that regard since its incorporation. In some cases the tap line has been extended beyond the immediate needs or requirements of the industry through the forests of the lumber company to a connection with a second trunk line. In most of these cases it frankly appears that this expense was not incurred until after the trunk line had given the lumber interest the assurance of better allowances than it was receiving from the trunk line on which its mill was built. The record makes it clear that the trunk lines were bidding for the traffic by offers of increased allowances, and that the lumber companies, the real beneficiaries, were selling their traffic for the allowances.

The main or tap line in a few instances has acquired a part of its right of way by condemnation proceeding. Ordinarily, however, the lumber company not only owned the real estate where the mill is, but all the property through which its tap line runs. In many cases care has been taken to deed the right of way to the incorporated railroad company; but in a large number of cases the tap line enjoys only a lease of its right of way. In some cases this is a tenancy at will, no written lease having been executed. In a number of cases the public carrier has supplied the rails used by the tap line on a nominal rental basis; in some cases both the rails and the equipment are owned by the lumber company and are leased to its tap line. The result in such cases is that the tap line, even though incorporated as a common carrier, has no really permanent character. The record discloses several instances where they have not only abandoned their operations but where the rails have been torn up. The Ouachita & Northwestern Railroad is such an instance. Fourteen miles of the

main line of this tap line were taken up notwithstanding the fact that it had served a number of good farms and had moved some agricultural products for the farmers. When asked how their traffic was now being moved, the witness for this line said that the farmers hauled it for themselves over the country roads. There was another small mill on this tap line, said to belong to outside interests; it is now draying its lumber to the public carrier that moves it to the markets. The Kendall & Sulphur Springs Railway went out of business as a common carrier after its pine lands had been cut over. It is still operated, however, as a facility of the lumber company, which is now manufacturing hardwood lumber. The explanation made is that the public carriers declined to give it allowances on hardwood, and it gave up the claim of being a common carrier, although it had some traffic from outside interests. There are other cases of tap lines operated as an alleged common carrier that were bodily removed when the forests had been cut over, and reconstructed through other forests of the lumber company. The record is not free from instances where the mill, rails, equipment, and all the other property of a lumber company were removed to a new territory. With a few exceptions there is scarcely a tap line on the record that would not necessarily cease its operations if the lumber mill of the proprietary lumber company were moved or ceased to run. Instances are shown of record where the tap line stopped running while the mill was temporarily shut down.

A few of the tap lines are incorporated as common carriers of freight and not of passengers. In most cases a caboose is the only car available for passengers; but several of the lines named on the record operate one or more passenger trains daily. A few run a passenger coach in their log and lumber trains; but many have no real passenger traffic and make no charge against the farmers and others who occasionally ride on the locomotive or in the caboose.

Different lumber companies move their logs from their forests to their mills in different ways. Ordinarily all the operations in the forest are conducted by the lumber company; the trees are felled by its employees and the logs are usually loaded on the cars by its steam loaders. Ordinarily they are hauled over the logging road by the lumber company with its logging engines to the point where commences what we have referred to as the incorporated tap line. They are ordinarily hauled thence to the mill by tap-line locomotives. In many cases, however, the tap-line locomotives run up into the forest and haul the log trains over the logging roads to the tap line and thence to the mill. In other cases the lumber company hauls the logs directly from the forest over its logging road and thence under trackage rights over its incorporated tap line to its mill. There

are about as many cases where the tap line receives no pay for the trackage rights as there are cases where the lumber company goes through the form of paying it some compensation for the use of its tracks. When its locomotives go into the forest and haul the logs over the logging road to its own rails the incorporated tap line, in the usual case, makes a charge against the lumber company for the service. But ordinarily no charge is made against the lumber company by the tap line for hauling the logs over the incorporated line to the mill. This part of the service is supposed to be covered by the allowances paid to the tap line by the public carriers. In some cases the employees of the tap line participate in loading the logs on the cars in the forest, and in some cases they unload the logs into the pond at the mill. Where this is done the service is supposed to be covered by the charge made by the tap line against the proprietary lumber company. Ordinarily, however, both the loading and unloading are done by employees carried on the pay rolls of the lumber company.

It is only in a few cases that any waybill or bill of lading is issued to cover the movement of the logs to the mill. This is true even where the rates are constructed in the form of milling-in-transit rates. In many cases the conductor of the logging train does not even hand in a slip to indicate the quantity of logs brought in to the mill. When the manufactured lumber goes out, billing is issued by a tap line or lumber company employed and in some cases dated on the day the lumber is tendered to the public carrier for transportation. This is done by an agent of the tap line who is sometimes exclusively employed by it, but is more often an employee of the lumber company; in many cases he is also the agent of the trunk line at the junction point. When no allowance is made, the mill is shown as the point of origin; but if the lumber is destined to an interstate point it gets an allowance and the other end of the tap line is shown on the billing as the point of origin.

There are cases shown of record where tap lines receive allowances, in one case as high as 4 cents per 100 pounds, on lumber as to which they perform no service whatever, either on the logs in or the lumber out. In another case the tap line does not reach the mill, but the logs are taken across a river by a conveyer running on a cable. The finished lumber is handled out of the mill by the trunk line. Nevertheless the tap line receives an allowance of 4 cents per 100 pounds on the theory that the lumber has originated at the other end of the tap line in the woods. When questioned, the witness for this road frankly admitted that his tap line performed no service whatever on the outbound lumber and that the allowance received was not paid to it for any transportation service but was a payment "for developing the traffic." In another somewhat similar case the unincor-

porated logging road reaches the river and the logs are floated thence across to the mill. The lumber is hauled by the incorporated tap line from the mill to the trunk line, a distance of $2\frac{1}{2}$ miles. Out of an 18-cent rate to St. Louis the tap line, which has no outside traffic, receives 4 cents for its haul or twice the rate under the state switching tariff, while the trunk line retains 14 cents for a haul of nearly 400 miles to destination. In all but a few exceptional cases the mill is located within an ordinary switching distance from the tracks of a public carrier and the latter is therefore able readily to handle the lumber out of the mill without the intervention of the tap line.

In general it may be said of all but a few of these incorporated tap lines that they have no real freight stations and are not otherwise equipped properly to handle less than carload freight or general merchandise; all claims to the contrary are shown by the record to be a mere pretense in most cases, and this is generally understood. Points on tap lines shown on the tariffs can often be located by no visible landmarks and have no real existence. Their so-called general offices are usually in the offices of the lumber companies; their accounts are very often kept by the bookkeepers of the lumber companies. Their cash often is kept in the same bank account with the cash of the lumber company, and in some cases the lumber company's checks are used for paying tap line bills. Not infrequently the allowances are paid by the public carriers directly to the lumber company for the account of the tap line, there being no other way to handle the transaction. And in practically all cases the officers of the tap line are also officers of the lumber company and the salaries paid to them are ordinarily shared in by each company. The free passes that they receive in their capacity as railroad officials are used by them when traveling in the interest of the lumber company. This was frankly admitted.

One feature in the distinction drawn by lumber companies between their incorporated tap lines and their unincorporated logging roads must not be overlooked. As just explained, when the tap line does not own its right of way it usually holds it under a formal or informal lease from the lumber company. But the lumber company never surrenders its ownership and absolute control over the logging roads. And there is a definite purpose in that course. It is ordinarily explained that the logging roads are more or less temporary in character, while the tap line is built in a more permanent way. But this explanation, while having some foundation in fact, is not complete. In most cases the tap line extends through lands of the proprietary lumber company that have already been cleared of pine and where hardwood only remains, or through pine forests that for some reason it is not lumbering; the logging roads reach beyond into its forests where its lumber operations are being conducted and often lie in the direction of forests owned by outsiders. In the usual case

the incorporated tap line is not so located as to be easily available to outside interests, while the unincorporated logging roads often closely approach the forests that are owned by others. While Mr. Foster, president of the Malvern & Freeo Valley Railroad, the tap line of the Wisconsin & Arkansas Lumber Company, was on the stand, he was asked why the tracks of his incorporated line ended at Landers and why the very extensive logging road of his company had not also been turned over to his incorporated company. He first declined to answer, but when told that the question was a proper one and that he must answer, he replied:

The reason we did not incorporate the tap line into the timber was because we wanted to control the timber in that section of the country so no outsider could come in and acquire it.

Other witnesses admitted that a lumber company, by retaining the direct ownership of the logging roads, acquire a virtual monopoly of the adjacent forests. Moreover, it is demonstrated by the whole record that the tap lines being constructed by and in the interest of their respective lumber companies are not only laid out but are operated so as best to serve the interests of the lumber investment.

GENERAL PRINCIPLE CONTROLLING THE CONTROVERSY.

Upon the record some 99 tap lines in the territory in question have laid before us their claim of a right to receive allowances and have disclosed their history, their manner of operation, and their relation to their respective mills. Naturally, there are wide differences in the way in which their operations are conducted. From a careful examination, however, of all the facts disclosed of record we have arrived at certain general conclusions that must control and guide us in the disposition of these cases:

The notion seems to prevail in the yellow-pine district west of the Mississippi River that a common carrier must be an incorporated company; on the other hand, it is also claimed that a company incorporated as a common carrier is a common carrier in law for all purposes, regardless of all other considerations. This, however, is not a sound view of the matter. In some of the states the local law permits only incorporated companies to act as common carriers by rail; and, as a matter of fact and practice, common carriers by rail are usually incorporated companies. At the moment we recall no exception. Nevertheless, the act to regulate commerce specifically applies "to any corporation or any person or persons" engaged in the transportation of passengers or property by rail from a point in one state to a point in another state. It follows, therefore, so far as interstate transportation is concerned, that incorporation is not a condition precedent to the right to be a common carrier by rail.

That relation to the public may lawfully be sustained, with respect to interstate traffic, by individuals or partnerships or other associations. The inquiry with this Commission, therefore, is not whether a railroad company has been incorporated, but whether the company or the person claiming to be a common carrier by rail is a common carrier in fact. If there is a holding out as a common carrier for hire, and if there is an ostensible and actual movement of traffic for the public for hire, generally speaking, the status of a common carrier may be said to exist, whether the holding out is by a company or by an individual. But such a holding out and the existence of an actual traffic is not conclusive in all cases. Where the holding out is in furtherance of a plan to secure unlawful advantages and the alleged carrier is able to pick up some traffic that is incidental to that purpose, it must be regarded simply as a cloak or device to effect unlawful results. This Commission, in the enforcement of the law, is necessarily bound to ascertain the real purpose and object of the holding out; and in the prevention of preferences and other unlawful consequences it is entitled to and must ascertain the real situation. In other words, whether a company or a person claiming to be a common carrier is a common carrier at all and for all purposes is a question of fact, and whether the service performed for a particular person is a service of transportation or an industrial service is also a question of fact.

It follows from that view of the matter that the common ownership of an industry and of a railroad that is held out as a common carrier and has some actual traffic for the public for hire is not in itself sufficient to divest the railroad of its status as a common carrier. On the other hand, the fact that the rails, locomotives, and cars of an industry have been turned over to an incorporated railroad company, owned and operated by the industry or in its interest, does not divest those appliances of their character as a plant facility if such in fact is the case. If the rails were laid and the equipment acquired for the use of the industry as a facility in the process of manufacture and production, and are so used, the fact that some outside traffic may be carried over the same rails does not modify the character of what is done over them for the industry. We must look at the thing done and scrutinize the manner in which it is done. We must ascertain what is its real relation to the industry. If in such a case the tracks and equipment are a facility of the plant and are so used in the process of manufacture, what is thus done for the controlling industry can not be regarded as a service of transportation. It is clear that a division allowed by a public carrier out of the rate under such circumstances is a rebate to the industry. But again, it must be added that the real relation of the tracks and locomotives to the industry is a question of fact that is not controlled by considerations of

mere ownership, but by a correct understanding of the service thus performed for the controlling industry.

EACH CASE MUST STAND ON ITS OWN FACTS.

The number of industries that use rails and locomotives in connection with their manufacturing operations is increasing, and there is a growing number of cases where allowances out of the rates are made to them by the regular lines. It is clear, therefore, that the time has come when the Commission must draw a line at some point between what is transportation and what is industry, and must distinguish between what is a facility of transportation and what is a plant facility or a tool of the industry. In the present state of the law it is no less clear, however, that the question is not susceptible of solution on general grounds; that no general rule or principle may be laid down that will do exact justice in all cases; and that the only safe course is to ascertain and determine on the facts disclosed in each case what is the real relation between the tap line and the industry by which or in the interest of which it was constructed and is now operated. With that view of the matter in mind we have carefully analyzed the testimony offered by each of the tap lines appearing of record and shall presently state each case in a summary outlining the features shown of record that we regard as of importance.

Before doing that, however, it may be well to look for a moment into the practice of the trunk lines in this territory in connection with their lumber traffic:

It is our understanding that in some cases the trunk lines have connected their rails with the mills by constructing spur tracks at their own expense; in other cases they have furnished the rails and the ties and the lumber companies have borne the expense of the grading and construction, and in a number of cases the lumber companies have built the connection entirely at their own cost, either directly or through their tap lines. In some instances the original spur or switch track built by the trunk line to the mill still remains and could be used; as a matter of fact, however, the tap-line connection subsequently built is actually used. In some cases, where the tap line has connected the mill with the trunk line, the spur track of the trunk line to the mill has been torn up. In some instances the trunk line is still closely connected with the mill by an available switch track, but in order to give the appearance of a real service the tracks of the tap line have been laid parallel to the trunk line to a more distant switch connection.

In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive

the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as 3 miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than 3 miles distant the transportation offered by the trunk line commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty. But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without discrimination, to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work. No allowance, however, ought to be made by a trunk line to a lumber company where the mill is within, say, 1,000 feet of the trunk line. We should regard an allowance under such circumstances as a mere device to effect an unlawful payment to the lumber company. We should take the same view of an allowance where a short switch track to the mill has been torn out or is still available but not used in order to give the appearance of a longer haul to the mill over a spur or switch track constructed by the lumber company or by its tap line.

Where a mill is distant more than 3 miles from a trunk line and is connected with the latter by a tap line not recognized by this Commission as a common carrier, no allowance or division may lawfully be made by a trunk line either to the lumber company or to its tap line. Such a lumber company, although using rails, stands in no

better position under the law with respect to its lumber than does a lumber company that uses other means of delivering its lumber to a public carrier. But where a mill is more than three miles distant from a trunk line and is connected with it by a tap line organized as a common carrier and so recognized by this Commission, the mill is to be regarded as a shipping point equally with all other mill points in the extensive rate group which the trunk-line carriers have defined in this territory; and the lumber rate is to be regarded as in effect from the mill, the tap line being entitled to a division thereof according to the extent of its participation in the through service under the through rate.

This view of the matter, it must be clearly understood, is based upon the particular conditions that we find existing in this lumber territory and the rate adjustment which there obtains. We shall not endeavor at this time to fix the allowances that may be made under section 15 to a lumber company furnishing a facility for the transportation of its lumber from its mill in the manner and under the conditions described or to fix the divisions on the lumber haul that may be paid by the trunk lines to tap lines herein recognized by the Commission as common carriers. The basis of such allowances and divisions may be proposed by the trunk lines for our approval after conference with the parties in interest. In submitting the matter to the Commission it will be well also to make a more complete statement as to the distance of the mills to which the trunk lines now extend the lumber rate without additional charge for the switching service that they perform. It will, of course, be understood that the allowances and divisions so submitted must have a proper relation to the service performed and be such in amount as not to effect a rebate to the industry. It must also be understood that a tap line herein recognized by us as a common carrier can not expect to continue to be so recognized if it does not itself recognize its obligations as a common carrier under the act to regulate commerce by conforming its accounting methods to the requirements of the Commission, by filing annual reports and lawful tariffs, by obeying the hours of service law and the safety-appliance acts, so far as they are applicable, and otherwise fulfilling the obligations and duties imposed by the act on carriers engaged in interstate commerce. We have no authority to overlook the failure of any company claiming to be a common carrier to fulfill all the requirements of the act and to comply with the rules and regulations of the Commission; and we shall regard any omission of its duty in this respect by a tap line as tending to show that its claim to be a common carrier is a mere device or attempt to justify allowances and divisions.

THE LOG MOVEMENT TO THE MILL.

It may be well at this point to make a brief reference to the haul of logs to the mill. Lumbering is one of the primary occupations and lumber products are as necessary and even more widely used than are the products of coal mines. Lumbering processes are more or less familiar to everyone. The forest must be made into logs and the logs must be drawn to the mill and there converted into lumber. Whether this is done with ox teams or horses, on wagons or sleds, or the logs are floated down a stream to the mill or are carried there in flumes or otherwise, the service that the lumberman thus performs for himself is industrial and not a service of transportation. When the adjacent timber has been manufactured there is an economy in reaching the more distant timber by the use of rails and locomotives, and these appliances are often used in the larger operations. But the character of the thing done is not affected by the new means employed to do it. Nor do the new appliances bear a different relation to the industry. A number of witnesses admit, and the whole record shows, that a large lumbering operation in this territory can not be conducted economically without a tap line. Tracks and locomotives are as necessary to successful results from the investment as the mill itself. One or two of the companies avail themselves of streams to float the logs to the mill, but all the other lumbering operations of any magnitude in the southwest have tap lines. East of the river, as we have seen, and in the majority of instances west of the river, they are regarded, like the mill itself, as a mere plant facility. Each of the tap lines west of the river that **now claims to be a common carrier** was originally operated directly by the proprietary lumber company and as a part of it. The only exception to that statement is that in the case of some of the more recent investments the tap line was incorporated and the track laid while the mill was being constructed. With one exception and regardless of the date of their construction, every tap line now before us is owned by or in the interest of a lumber company, and with one exception was built by the same people that own the forest and the mill, and with no other real object than to serve the mill as a necessary plant facility. That is their present primary purpose and use and no pretense to the contrary is made.

It is said that parts of the trunk lines now serving this territory were originally tap lines. That is true, and it may be, when the timber is cut away, that parts of this country may develop and some of the tap lines now under consideration may ultimately pass into the control of the trunk lines. This, however, can not be accepted as an excuse for the continuance of discriminations that now exist or for allowances that amount to unlawful concessions from the

rates. With a very few exceptions not one of the tap lines before us would continue to operate if the mill by which, or in the interest of which it is owned should cease to run; they were all built to serve the proprietary mill and the incorporation was an afterthought developed out of the keen competition of the trunk lines for the traffic. Their real relation to the industry is primarily nothing but that of a plant facility, and such outside traffic as they are able to pick up is purely incidental. With one or two possible exceptions not one of them would have been built or would now be operated for the outside traffic only; not one of them would cease its operations if deprived of the outside traffic altogether, for it is a part, and a necessary part, of the lumber investment; and with two or three exceptions not one would continue in operation after the mill to which it belongs had been shut down. In other words, with very few exceptions they are purely plant facilities.

As we have seen, this is the theory upon which the lumber interests in general are to-day manufacturing their lumber and competing with one another in the general lumber markets. It is the theory that prevails in the yellow-pine district east of the Mississippi River, and is the theory upon which a majority of the lumbering operations west of the river are conducted. They are hauling their logs to their mills at their own cost and with facilities that they regard as a mere adjunct to and a part of the machinery of manufacture. It is clear, then, that appliances that are generally regarded by the lumber interests themselves not only as mere plant facilities, but as necessary facilities in the successful conduct of their investments, can not reasonably be held to become the transportation facilities of a common carrier merely because a lumber company has incorporated a small railroad company and turned the facilities over to it. There must be something more substantial than a mere manipulation of the situation in order to change the real relation of these facilities to the industry. As with the movement of lumber from the mill, so with the movement of the logs to the mill, we must necessarily hold that it is an industrial service pure and simple, except when performed for the lumber company over the rails and with the power and equipment of a tap line that is a common carrier not in form only but in fact as well. And here, again, we find it impossible to lay down any general rule or principle by which in all cases it may be determined whether the movement of logs from the forest to the mill is transportation under the act or merely an industrial service. Each case must stand upon its own facts. But two conditions are clearly essential in all cases: No tap line that is, in fact, a common carrier engaged in interstate commerce may haul the logs to the mill of the proprietary company free of charge, as is the case in many of the instances before us. A free service is inherently unlawful.

Nor may a trunk line set up a milling-in-transit privilege with a common carrier tap line by which the lumber rate is extended back through the mill point to the tree in the forest unless it pursues the same course with respect to forests on its own line. That would be an unlawful preference. In this lumber territory the trunk lines make net rates for a log haul over their own rails when they have the lumber movement from the mill. These rates vary, but a typical tariff now before us makes a net rate of 2 cents per 100 pounds for a log haul of 25 miles, and $2\frac{1}{2}$ cents for a haul of 50 miles, the established rate from the mill being collected on the outbound lumber. On the other hand, in many cases the rate adjustment with tap lines is such that the lumber rate is extended back through the mill to the tree in the forest in such a way as to include the log haul to the mill. It will suffice to say that any milling-in-transit rates proposed for our approval with a tap line recognized by the Commission as a common carrier must be adjusted on a nondiscriminatory basis, and the tap-line division, as heretofore stated, must be fixed in an amount that will not effect a rebate to the industry.

USE OF PASSES BY TAP-LINE OFFICERS.

With scarcely an exception the officers of the tap line are officers of the lumber company in the interest of which it is owned and operated. Throughout the record it was frankly admitted that they make use of the privilege of free transportation extended to them by the trunk lines even when traveling on the business of the lumber company and in the capacity of an officer of the lumber company. In one case "car and party" passes are shown to have been used. This is another of the advantages to industries that own short lines serving their plants, and which they have caused to be incorporated as common carriers. The use of such free transportation we regard as altogether improper and unlawful, even though the holder may be an officer of a tap line that we have found to be a common carrier. The affairs of the proprietary lumber company are so interwoven with the affairs of the tap line as to make it impossible to admit the right under the law of an officer of a tap line to use free transportation.

THE INDIVIDUAL CASES DESCRIBED.

To these general observations it may fairly be assumed that no valid objection can be made, for what is a plant facility can not also be a common carrier for the plant, and what is an industrial service can not also be a service of transportation. These principles, we think, should be applied to each of the companies whose affairs are now to be stated. In the brief summary that follows we have endeavored to outline the history of each tap line, its ownership, physi-

cal condition, the nature and source of its traffic and revenues, and the manner in which its operations for the proprietary company are conducted. Our finding is that in none of the cases that follow does the tap line perform a service of transportation as a common carrier either in the movement of the lumber of the proprietary company from its mill to the trunk line or in the movement of its logs from the forest to its mill.

MALVERN & FREEO VALLEY RAILWAY.

The entire capital stock is owned by the stockholders of the Wisconsin & Arkansas Lumber Company—"a community of interests; they are both held by the same stockholders." This statement was made by the president of the tap line, who is also president of the lumber company; he admitted that both properties constitute practically one investment, and this is also admitted on the brief. In its report for 1910 it appears that all the stock of the tap line is now held by the president of the lumber company as trustee for its stockholders. None of the officials of the tap line receive any salary from it, but all are under salary by the lumber company.

The tap line extends from a point near the mill to a logging camp in the forest called Landers, a distance of about 9 miles. The legal title to this track is in the tap line. The track leading through the mill yards to the junction with the Rock Island and Iron Mountain, a point called Walco, is owned by the lumber company, but is leased to the tap line. There is no industry at Walco other than the mill nor any at Landers. The lumber company has a commissary store at the mill and another in the woods. There is a rough, temporary board shed at Walco, but no station or agent at Landers.

The mill and the road were constructed at the same time and together went into operation during the spring of 1902. At this time the tap line was owned directly by the lumber company. The mill was built on the Iron Mountain tracks; at that time the Rock Island terminus was at Malvern, a mile and a half away. While this condition existed the Iron Mountain had the bulk of the traffic and paid an allowance for it, although an occasional carload reached the Rock Island at Malvern, being switched there by the Iron Mountain.

In 1905 the Rock Island built to a point within a half mile of the mill. Its approach was accompanied by an understanding, afterwards reduced to contract, by which the Rock Island agreed to make an allowance of 3 cents per 100 pounds and the lumber company agreed to give the Rock Island the bulk of their tonnage. We shall not stop to go into the details of the contracts between them. Under their terms the Rock Island now gets 66 $\frac{2}{3}$ per cent of the outbound shipments of the lumber company; and it reserved the right to fix rates inbound and outbound both on lumber and other traffic,

whether handled by the tap line for the lumber company or for the public. Another feature of the agreement is the provision that in case the allowance is declared illegal by this or any other commission or by any court it shall no longer be payable or shall be modified as the circumstances might require, and that in such case no claim or demand would accrue against the Rock Island. The lumber company was a party to these contracts.

The proximity of the Rock Island and its offer of such a traffic arrangement was followed by the incorporation of the tap line, which thereupon acquired the equipment of the lumber company and the right of way from the mill to Landers. This was accomplished by an exchange of its capital stock. No money passed and no further stock has been issued since the transaction was completed. When asked why the tap line had been incorporated, its president replied that it was done for the express purpose of legalizing the allowance. The tap line has no passenger, mail, or express business. Out of revenues of \$41,131.40 for the year 1910 its outside traffic is stated at \$2,058.17. In 1909 its outside traffic aggregated \$241.67, and for 1908 it amounted to \$90.47. An examination develops the fact that of the outside traffic claimed for 1910 \$1,985.61 was for oak staves and stave bolts, all of which doubtless came from its own forests. The other traffic claimed for outsiders during that year consisted of four carloads of fertilizer and one carload of brick, on which was collected the local state rate. If it had any such traffic in 1910 or 1911, it was so inconsiderable that it was not thought worth while to show it on the annual reports to the Commission for those years.

The line ends, as heretofore stated, at Landers. From that point the lumber company owns 17 miles of logging road radiating into its forests. Most of the rail in the logging road was supplied by the Rock Island under lease at a rental of 6 per cent on a valuation of \$28 per ton. It is interesting to note that, while the tap line acquired the locomotives of the lumber company as heretofore explained, all but one of them are used by the lumber company on its logging roads. The tap line has no equipment suitable for general traffic, all its cars being logging cars specially adapted for hauling logs.

Throughout the investigation it appeared that the lumber companies are careful to draw a sharp line between the "tap line" and the "logging road," and there is much significance in this practice. As heretofore stated, while Mr. Foster, president of this tap line and also president of the lumber company by which it is owned, was testifying it appeared that it was the desire to legalize the allowance that led to the incorporation of his tap line to Landers and the desire to monopolize the forests and thus control the timber that led the lumber company to retain the ownership of the logging

road beyond Landers. The Wisconsin & Arkansas Lumber Company has added 35,000 acres to its original holding of 75,000 acres of timber lands. Of this total holding about 65,000 acres are still uncut and will yield 500,000,000 feet of lumber and keep the mill and its tap line in operation for 12 or 14 years. At the expiration of that period Mr. Foster did not know whether the tap line would be taken up, as has happened in a number of cases, or whether it would continue in operation.

As hereinafter appears, the logs are hauled by the tap lines or logging roads of lumber companies under a variety of conditions. In this case it appears that after the logs have been loaded by the lumber company on the cars the locomotive of the incorporated tap line runs up into the woods over the unincorporated logging line and hauls them to the point called Landers; from that point it hauls the cars over the tap-line tracks to the mill, where the logs are unloaded into the mill pond by employees of the lumber company. The tap line makes a formal charge against the lumber company of 80 cents per thousand feet, log scale, for hauling the logs over the unincorporated logging tracks to Landers. It makes no charge against the lumber company for hauling the logs from Landers over the incorporated line to the mill.

There are no bills of lading, waybills, or other shipping papers covering the movement from the forest to Landers; nor is there any billing covering the movements of the logs from Landers to the mill at Walco. When the manufactured lumber is ready for shipment it is loaded by the employees of the mill on cars furnished by the Rock Island or Iron Mountain, which are switched from the mill to these lines by the tap line, a distance of a few hundred feet in the case of the Iron Mountain and half a mile in the case of the Rock Island. A bill of lading is then issued by the agent at Walco, who is a joint employee of the Iron Mountain and of the Rock Island; it is dated on the day the lumber is tendered for transportation and shows Landers as the point of origin and not Walco. The tap line receives out of the rate 3 cents per 100 pounds, which is equivalent to from \$12 to \$18 for carloads of 40,000 to 60,000 pounds. Its president says that the carriers "should pay if they want the tonnage."

WILMAR & SALINE VALLEY RAILROAD.

This tap line extends from Wilmar due south 12 miles to Godwin, both in the state of Arkansas. From the latter point 15 miles of logging roads reach in to the timber. All are owned by the Gates Lumber Company, its mill being at Wilmar, where the tap line joins the Iron Mountain. Godwin is a place of 30 or 40 people, most of whom are company employees; the place seems also to be known as

Bailey. At one time the tap line ran to the north of the mill, but this track was removed, the lumber company now doing its logging south of the mill. The equipment is owned by the lumber company but is leased to the tap line without charge. The officers of the two companies are practically identical. The lumber company and the tap line have the same paymasters. The tap line files annual reports and claims to keep its accounts as prescribed by this Commission. It also claims to be recognized as a common carrier in Arkansas. While separate books of account are kept, the cash of the tap line is kept with the company cash in the same bank, and all checks are drawn by the lumber company for the tap line. It has no revenues from passenger, mail, or express service. At the time of the hearing a witness said that there was a prospect of moving three carloads of cotton seed; but although it is said to reach some good farming country the annual report for 1910 shows no freight other than forest products.

The tap line has no joint rates with the Iron Mountain to interstate points except on lumber from Godwin, at its farther end. The rate is made by adding 2 cents to the Iron Mountain rate on lumber from its junction with the tap line at Wilmar. The tap line division is 4 cents, which gives it a net allowance of 2 cents. There is no outside mill on this line, and such a rate adjustment would necessarily discourage the erection of a mill by outsiders, for while it would enable the mill of the Gates Lumber Company, owning the tap line, to compete on an even basis with mills elsewhere, it would put an outside mill erected on the line at a disadvantage of 2 cents per 100 pounds.

The lumber company hauls the logs over the logging lines to the tap line, while the tap line hauls them thence to the mill. On state shipments the mill is shown as the point of origin; on interstate shipments Godwin, the other end of the tap line, is shown as the point of origin. When asked for an explanation of this difference in the billing, the reply was made that it was not necessary on state shipments to show Godwin as the point of origin because no allowances were paid on any but interstate shipments, and the actual point of origin is therefore shown. From the mill to the Iron Mountain tracks, a distance of 2,000 feet, the manufactured lumber is hauled sometimes by the tap line, but more usually by the Iron Mountain. At the time of the hearing the tap line was doing most of the service, because of the temporary disability of the Iron Mountain engines. The net operating revenue to the tap line for the year 1909, after making substantial allowances for maintenance of way and structures, maintenance of equipment, and transportation expenses, is shown at the sum of \$24,872.43. For 1910 it amounted to \$29,778.02. Its capital stock amounts to but \$50,000 and is said

to represent the actual cost of construction; the dividends shown as paid during the year 1910 aggregated \$28,164.02, or more than 50 per cent on the investment. These figures, drawn from its own reports without any further examination as to details, include the sums credited to the tap line by the lumber company for its services on the logging road. Accepting its own figures, it appears that the entire operating expense of the tap line, including the cost of its service on the logging road, was substantially made good by the Iron Mountain for both years through its allowances.

ARKANSAS & GULF RAILROAD.

The Kimball Lumber & Manufacturing Company is unincorporated and is owned largely, if not entirely, by Mr. Phin Kimball. The tap line of the company is incorporated as the Arkansas & Gulf Railway. It extends from Kimball, in the state of Arkansas, across the state line to Laark, in the state of Louisiana, a distance of seven miles. Kimball is not a town and is now even without a station, one built by the Iron Mountain having been destroyed by fire. It is simply a point of interchange between the tap line and the Iron Mountain. Laark is a company town owned by Mr. Kimball. There is a post office and Mr. Kimball is the postmaster. There are about three miles of logging spurs extending into the 35,000 or 40,000 acres of timber there owned by Mr. Kimball. The tap line was incorporated in 1905, but no capital stock has been issued. It has a bookkeeper, timekeeper, an agent at Laark, "and a lady accountant at St. Louis." There are no stations or station buildings, and the agent at Laark is also in the company's store at Laark owned by Mr. Kimball. Upon inquiry it appears that Mr. Kimball understood that he owned the tap line, but that he "has a few local partners who own between \$300 and \$400 in the investment." Automatic couplers are not used on the logging cars, because the road is so rough they will not stay coupled. Passengers are carried between Kimball and Laark upon a motor car; it also takes the mail. There are no passenger tickets, fares being collected in cash. This traffic does not seem to be covered by a lawful tariff, although as the tap line crosses the boundary line between the two states it is necessarily interstate traffic. There is no development in the surrounding country, such farms as formerly existed there having been abandoned, and there is no traffic to speak of except that of the lumber company. The present source of the outside traffic of the tap line is thus described by Mr. Kimball in a letter filed in lieu of a brief:

I have designated by writing the word "Ranch" on the map where residents live, which you will note are six—this is all—and these six will not average 25 acres each, and doubt if 15 acres each of cultivated lands. They have hogs and cattle that run "wild" in the forest, free of cost, and that is the cause of the "clearings" at those points.

The mill is at Laark, and the tap line enters a charge of \$1.50 per car for hauling the logs from the several spurs to the mill. During the year 1909 it hauled 3,000,000 feet of logs from the forests near Kimball. For hauling the manufactured lumber back from Laark to Kimball the Iron Mountain allows the tap line from 2 to 3 cents a hundred pounds, but as the rate on lumber from Laark is 1 cent higher than the rate from Kimball the net amount accruing to the tap line is 1 and 2 cents. Although Mr. Kimball is president and traffic manager of the tap line, he receives no salary from it, but does enjoy free transportation over the trunk lines, and uses passes when traveling on the business of his lumber company.

A reading of the testimony of this witness does not give an adequate impression of the humor with which he offered it, or the amusement with which it was heard by those present. Rudimentary as was his effort to give a legal form and appearance to the separation of the tap line from his lumber company, his case does not differ substantially in that respect from many other instances on the record. Many of the Arkansas tap lines are chartered with the health resort known as Hot Springs as a terminus, but none had reached that point at the date of the hearing, nor was any prospect shown by any tap line of such a fulfillment at any time in the future of its charter powers. Mr. Kimball, in a letter addressed to the Commission after the hearing, explains the future prospects of his railroad in this wise:

As I have before stated, The Arkansas & Gulf Railroad is going to be built *somewhere—either south, east, or northwest, or likely both.* It was started with that full intention, and was stopped because railroad building was stopped in that section generally, and it now needs help, more than ever, and not a "knock." Please help me boost it.

While this seems somewhat indefinite it is in fact no less definite than are the plans for future extensions put forth by many others.

The Arkansas & Gulf tap line differs from the great majority in that the mill was not built on the tracks of the trunk line but 7 miles away in the forest, and the manufactured lumber is therefore hauled by the tap line for that distance. Mr. Kimball explains the location of the mill by saying that while it is a costly enterprise to build a manufacturing plant in the woods away from the main line and he could have saved thousands of dollars by building it on the tracks of the Iron Mountain, he always thought the railroad "was the best part of the proposition."

LITTLE ROCK, MAUMELLE & WESTERN RAILROAD.

The Little Rock, Maumelle & Western Railroad extends from a connection with the St. Louis, Iron Mountain & Southern about 3 miles south of Little Rock, Arkansas, westward for 16 miles to a point known as Maumelle, from which unincorporated logging spurs, ag-

gregating about 10 miles in length and owned by the Neimeyer Lumber Company, radiate into the woods. The tap line, which has issued capital stock to the amount of \$160,000 and 6 per cent bonds for \$132,000, is substantially identical in interest with the A. J. Neimeyer Lumber Company. The stockholders of the tap line are stockholders of the lumber company, and most of the bonds are owned by stockholders of the lumber company.

The timber holdings of the lumber company, which are extensive, were acquired from the St. Louis, Iron Mountain & Southern Railroad Company in 1904. The tramroad was built two years later by the lumber company from the junction with the Iron Mountain for a distance of 7 miles into the timber; in 1907 it was extended 2 or 3 miles to a point known as Carnes; and in 1908 it was completed to Maumelle. The separate railroad corporation was not formed until 1907, and took over at that time the tracks already built and operated by the lumber company.

It is important to observe that the tap line parallels the line of the Rock Island, which is at no point more than 5 miles away. The intervening country is hilly and broken. Three towns are mentioned on the record as being reached by the tap line. Becker is a sawmill settlement, its only other industries being a brick plant and the penitentiary; at Carnes there is a small hardwood mill, which cuts hardwood lumber for the Neimeyer Lumber Company, at a charge of \$3 per 1,000 feet; and Maumelle, otherwise known as Douglas, is apparently only a logging camp. There are two or three small stave shippers on the line.

Two regular trains are run daily in each direction; their principal load is logs, but they also carry some passengers, who pay cash fare. The revenue from that source in 1911 was \$2,223.11. The equipment consists of one locomotive, a combination caboose for the carriage of passengers and less-than-carload freight, several work cars, and a few flat cars. There is also a motor car, which was acquired from the lumber company and which is still used by its employees in the inspection of timber. All the equipment is second hand and was purchased very cheap.

The mill of the Neimeyer Lumber Company is located about three-fourths of a mile from the junction with the Iron Mountain, but the distance from the sawmill and planing mill to the actual point of interchange where cars are delivered to the Iron Mountain is about one-eighth of a mile. The main track of the tap line runs through the lumber plant. The logs are hauled over the unincorporated logging spurs to the point known as Maumelle, by employees of the lumber company, which owns and operates for this purpose three locomotives and 70 logging cars. From Maumelle the loaded cars are hauled by the locomotive of the tap line to the pond, where the trainmen assist

the employees of the mill in unloading the logs. For the movement of the logs from Maumelle to the mill the tap line charges the lumber company 2 cents per 100 pounds, but 40 per cent of this amount is subsequently refunded, pound for pound, when the lumber is shipped out. The tap-line engine switches the empty cars furnished by the Iron Mountain and switches the loaded cars from the mill to the point of interchange with the Iron Mountain, a distance of about one-eighth of a mile. This service is paid for by the divisions, where joint rates are in effect. There are joint rates to practically all points except destinations in the states of Arkansas, Oklahoma, Louisiana, and Texas, the joint rates being uniformly 2 cents higher from points on the tap line than from the junction point. The tap line receives a division of 5 and 6 cents per 100 pounds, which includes the 2-cent arbitrary. In other words, the Iron Mountain shrinks its rate 3 and 4 cents per 100 pounds. There are, as heretofore stated, no joint rates to Arkansas, Oklahoma, Louisiana, and Texas. On shipments to points in those states the tap line receives a switching charge of \$3 a car, which is paid by the lumber company or its customer in addition to the rate of the Iron Mountain. The stave men who ship over the tap line to Arkansas points do not have the benefit of joint rates, but pay a local charge to the tap line in addition to the rates of the Iron Mountain. Their traffic, however, is inconsiderable in amount, the total movements of staves for the year covered by the record being 300 tons and the traffic of the hardwood lumber mill amounting to 7,000 tons, out of a total movement over the tap line amounting to upward of 105,000 tons. No other freight was shipped out over the tap line, and the inbound freight was limited to a small quantity of hay, coal, castings, and merchandise, largely if not wholly for the lumber company or its employees. The traffic of the lumber company has nearly 93 per cent of the whole tonnage.

Approximately 40 per cent of the product of the Neimeyer Lumber Company is switched by the Iron Mountain to Little Rock and delivered to the Rock Island, which absorbs the Iron Mountain charge of \$3.50 per car and in addition pays the Little Rock, Maumelle & Western a division of 5 and 6 cents per 100 pounds.

The officers of the tap line, with one exception, are officers also of the lumber company, and receive substantial salaries from the tap line. Through their connections with the tap line the officers of the lumber company enjoy passes over the trunk lines, which they freely use.

The tap line is operated at a profit, its operating revenues for the year 1910 being \$47,341.83, and its operating expenses, \$22,607.58, including substantial salaries to its officers, who are officers also of the lumber company. The net operating revenue was therefore \$24,734.25, against which is charged taxes and interest to the amount of

\$22,231.12 on the bonds held by stockholders of the lumber company. It had a low operating ratio, 47.7 per cent.

The engine and cars of the tap line are repaired by the lumber company in its shops at Becker, and the cost is charged against the railroad.

BEIRNE & CLEAR LAKE RAILROAD.

The Beirne & Clear Lake Railroad is a narrow-gauge tap line built to serve the mill of the Penn Lumber Company at Beirne, Ark. The two companies are identical in interest. The tap line consists of $4\frac{1}{2}$ miles of track, constructed some years ago at a cost shown on its books as \$8,000; but it was not incorporated until March, 1909, being operated previous to that date as an unincorporated logging road. The lumber company also has $4\frac{1}{2}$ miles of unincorporated track which it leases to the tap line for a consideration of \$300 per year. The mill of the Penn Lumber Company is one-half mile from the junction with the Iron Mountain. There is also a small stave mill and a manufacturer of hickory bolts and shafts at Hartley, where the unincorporated tracks meet the incorporated tracks.

The entire traffic of the Beirne & Clear Lake consists of forest products, practically all of which is the property of the Penn Lumber Company, and on which it receives a division from the Iron Mountain of 2 cents per 100 pounds, the joint rates being the same as the rates of the Iron Mountain from the junction point. The tap line charges the lumber company \$3 per 1,000 feet for hauling the logs from the timber to the junction between the unincorporated and the incorporated tracks. It operates a logging train daily and employs one train crew, a switch engine crew, and one section gang. It has nothing in the way of scales or warehouses, and its equipment is limited to 2 locomotives and 12 log cars. Its operating expenses are slightly in excess of the revenues. Although receiving a division under the claim of being a common carrier, subject to the act, it did not file an annual report with the Commission until the last fiscal year.

MISSISSIPPI, ARKANSAS & WESTERN RAILWAY.

The Mississippi, Arkansas & Western Railway, consisting of 8 miles of main track, was acquired by the Bliss-Cook Oak Company, which now controls it, in 1904 or 1905, when that company took over all the property of the Chico Lumber Company, including stock in the tap line corporation to the amount of \$220,000 and bonds of the same face value. The tap line had been incorporated in 1902, and it is admitted to be overcapitalized.

The mill of the lumber company manufactures hardwood lumber and is located about $1\frac{1}{2}$ miles from the rails of the Iron Mountain.

In addition to the tap line the lumber company has 20 miles of unincorporated tracks extending from the end of the tap line into and through the timber. The tap line has 4 locomotives, 20 box and flat cars, and 53 log cars. There are two train crews who work jointly for the lumber company and the tap line. It has not had through rates on lumber with the Iron Mountain for the past two or three years; and the joint rates formerly in effect were 1 cent per 100 pounds higher than the Iron Mountain rate from the junction point; the net allowance then paid to the tap line was 1 cent and 2 cents per 100 pounds. Passengers are carried without charge. Since the cancellation of the joint rates and the discontinuance of divisions a charge of about \$2.00 per car has been made against the lumber company for hauling the logs over the incorporated tracks to the mill. The unincorporated tracks are operated by the lumber company itself. The tap line does not make any charge, as the record clearly states, for the less than carload movements of staves, products, and supplies, amounting to about a carload a week, which it makes for the farmers along its line. Its traffic during the year covered by the record amounted to 4,229 carloads of logs and 605 carloads of lumber. These figures are understood to include 100 carloads of logs which it hauled for a lumber company having a mill some distance away on the Iron Mountain and for which it made a charge of \$2.50 per car for the movement from the loading point to the junction with the Iron Mountain. It also claims to have handled during the year mentioned five or six carloads of staves, on which it received a division of the joint rate then in effect with the Iron Mountain, and 20 carloads of stove bolts.

The annual report for the fiscal year ending June 30, 1910, shows a net operating revenue of \$7,242.53 available for the payment of interest and taxes, which exceeded that amount, leaving a loss for the year. It had, however, a surplus of \$12,910.13 from previous years.

The allowances which the Mississippi, Arkansas & Western formerly received were cut off by the Iron Mountain as the result of our decision in *Fathauer v. St. L., I. M. & S. Ry. Co.*, 18 I. C. C., 517. An opportunity was afforded in this proceeding for a full statement of the affairs of the tap line and its controlling lumber company, and the facts here briefly set forth were then developed.

BEARDEN & OUACHITA RIVER RAILROAD.

The mill of the Cotton Belt Lumber Company at Best, Ark., was erected in 1885 and is served by the St. Louis Southwestern Railway Company. The tracks and equipment which the lumber company constructed and acquired a few years later for the hauling of logs to its mill were conveyed in 1904 to a railroad corporation which it

then created, known as the Bearden & Ouachita River Railroad Company. The new corporation, as is admitted of record, was formed for the purpose of legalizing allowances out of the published rates. Its capital stock, amounting to \$28,000, was distributed among the stockholders of the lumber company as a stock dividend, and the shares in the two companies are now held substantially by the same persons and in the same proportion. It has no bonded or other indebtedness, the capitalization representing the cost of the road except for some seven or eight thousand dollars expended out of earnings for betterments.

The tracks of the tap line extend from the mill at Best for a distance of 14 miles to a point known as Caney, from which unincorporated logging spurs extend into the woods. The equipment of the tap line consists of 1 box car and 50 logging cars, together with 3 locomotives, 2 of which are exclusively used by the lumber company for the movement of carloads of logs over the unincorporated spurs to Caney. From that point the logs are hauled by the tap line to the mill. The tap line makes a charge of $10\frac{1}{2}$ cents per ton against the lumber company, which is intended to cover the use of the tap line locomotives and logging cars on the unincorporated spurs in the woods, and the unloading of the logs by the trainmen of the tap line at the mill. The empty cars are placed at the mill by the trunk line, which subsequently moves the loaded cars out. The tap line is accorded a division of from 1 to $2\frac{1}{2}$ cents per 100 pounds out of the published rates. There are no joint rates either for class freight or for other commodities than lumber; such merchandise as is handled pays a local rate to or from the junction point in addition to the charge of the trunk line. The traffic includes an occasional carload of cotton, fertilizer, feed, or supplies, of which a substantial proportion is for the lumber company and its employees. More than 95 per cent of the tonnage, amounting for the year 1910 to 58,000 tons, consisted of logs handled for the lumber company. There is one train daily in each direction operated on an irregular schedule, on which passengers are permitted to ride without charge. The employees consist of one train crew and one gang of track men. The woods foreman of the lumber company acts as agent for the tap line at Caney.

Annual reports are filed with the Commission and show that the operation of the tap line is profitable.

ARKANSAS EASTERN RAILROAD.

In 1907 the Baker Lumber Company, whose hardwood sawmill is located on the line of the Frisco at Turrell, Ark., incorporated the main line of its logging road, extending from the mill for a distance

of nearly 7 miles to a point known as Hafer, the corporation thus formed being known as the Arkansas Eastern Railroad Company. The authorized capital stock of the new corporation was \$112,000, of which only \$42,500 has been issued, and this went to the stockholders of the lumber company. In addition to the tracks which it turned over to the corporation thus formed, the lumber company has retained the direct ownership of several miles of logging spurs that extend from Hafer into the timber. The expense of maintaining these unincorporated tracks is borne by the lumber company itself, but they are operated for it by its tap line. The equipment of the tap line consists of 3 locomotives and 50 logging cars. The only service it performs on the traffic of the controlling corporation is the movement of the logs from the woods to the mill, and for this it is compensated by the allowance of $1\frac{1}{2}$ to 3 cents per 100 pounds which is paid by the Frisco out of the published rates. In addition, it is credited \$25 a day by the lumber company for the movement of the logs by its crews and engines over the unincorporated spurs. The manufactured lumber is moved by the trunk line directly from the mill.

Although the country through which the Arkansas Eastern operates is described of record as good agricultural land, with a number of small farms, there is no indication of any substantial traffic other than forest products. It was said at the hearing that 300 bales of cotton would be moved during the season then beginning, and the brief indicates that this prediction proved correct.

The only traffic of substantial volume that was not supplied by the controlling interest consisted of several hundred carloads of logs which the tap line moved from the logging spurs of the controlling lumber company to Turrell for the account of the Wisarkana Lumber Company, whose mill is located at Nettleton, about 50 miles distant on the Frisco. For this movement of logs the tap line made a charge of 2 cents per 100 pounds; and the tariffs indicate that an additional charge was made by the Frisco for their movement from Turrell to Nettleton. Although the testimony is that this tap line had filed annual reports with the Commission, this is not verified on our records. No annual report has ever been rendered by that company to the Commission.

BLYTHEVILLE, BURDETTE & MISSISSIPPI RIVER RAILWAY.

The Three States Lumber Company erected its hardwood mill at Burdette, Arkansas, in the year 1900, and built a track 5 miles in length from that point to Wolverton Landing, on the Mississippi River, near the town of Luxora. This track was used for hauling the machinery to the mill and afterwards for the movement of logs

the mill and lumber to the landing, from which the lumber is taken by steamer up the river. Later the line of the Frisco was built in through Blytheville and Luxora, and a spur track $1\frac{1}{2}$ miles long was built from the mill to a connection with that trunk line at Burdette junction. The lumber company subsequently incorporated the tap line as the Blytheville, Burdette & Mississippi River Railroad Company, in 1906, and took \$100,000 in stock and the same amount in bonds in exchange for the railway tracks and equipment. Additional stock to the amount of \$40,000 has since been issued, practically all of which is in the hands of shareholders of the lumber company. The statement made in the brief is that most of the stock in the tap line is held in trust for the stockholders of the lumber company. In addition to the tracks referred to, there are three so-called branches which are apparently nothing but temporary spurs used in the logging operations of the lumber company. An extension is planned from Burdette northward to Blytheville, a town of some importance, where a connection will be effected with the Cotton Belt; and it is said that this will be for the purpose of serving the general public rather than in the interest of the mill. It will be observed, however, that if constructed the track from Burdette to Blytheville will parallel the Frisco. Moreover, the tap line as it at present exists is nowhere more than $1\frac{1}{2}$ miles from the line of the Frisco. It is apparent therefore that the claims it makes for future development as a carrier serving the public are without foundation, except so far as they involve dividing the traffic of that country with the Frisco. It is said that only 41 per cent of the revenue of the tap line for the year 1910 accrued on the tonnage of the Three States Lumber Company. In other words, the statement made of record is that 9,167,500 pounds of forest products and 691,612 pounds of other freight were handled for the Three States Lumber Company, for a total charge of \$600.24, while 19,906,512 pounds of forest products were handled for others at a charge of \$3,666.88, with miscellaneous freight weighing 2,525 pounds, on which the charges were \$37.60. A close analysis of these figures and other statements made of record, however, will not verify the claims made by the tap line. The principal shippers mentioned on the record other than the Three States Lumber Company are a small manufacturer of scythe handles, and a cooperage company, which is owned by one of the stockholders of the lumber company and obtains practically all of its raw material from the lumber company, as is admitted of record.

The equipment of the tap line consists of 4 locomotives and 19 passenger cars. The lumber company owns the logging cars. There is a warehouse and platform at Burdette and a shed or station building at the river landing. The officers of the tap line receive no salaries; and the salary of the agent at Burdette, who makes out through billing, is \$31. C. C.

paid by the lumber company, whose clerks keep the books of the tap line without charge. When the mills are in operation two log trains are run daily in each direction between Burdette and the woods to the westward. Trainloads of lumber are hauled from Burdette to the connection with the Frisco as occasion requires. The service from Burdette to the river landing is irregular, but the trains meet all steamboats. Passengers are permitted to ride on the train without charge.

For the movement of logs to the mill the tap line charges the lumber company 2 cents per 100 pounds. It receives an additional 2 cents or 3 cents per 100 pounds from the Frisco as an allowance out of the joint rates for the movement of the lumber from the mill to the Frisco. For the lumber delivered to the steamers at Wolverton Landing the tap line charges 2 cents per 100 pounds. It furnishes the cars for such shipments, whereas on traffic moving over the Frisco the car is supplied by the trunk line.

BROOKINGS & PEACH ORCHARD RAILROAD.

The hardwood mill of the Harris Manufacturing Company, at Brookings, on the bank of the Black River, in the state of Arkansas, and the equipment and narrow-gauge track of the Brookings & Peach Orchard Railroad, extending from that mill to the line of the Iron Mountain, a distance of 3 miles, were purchased in 1907 by the Quellmalz Lumber & Manufacturing Company. The mill and the tap line are substantially one investment. The latter was not incorporated, however, until 1908, when its track was rebuilt by the present owners and changed to standard gauge. The officers of the tap line are officers also of the lumber company; and while they receive no salaries from the tap line they are accorded annual and trip passes for interstate use by the trunk lines. In addition to its capital stock of \$6,000, the tap line owes the lumber company nearly \$10,000 on account of purchases of steel and equipment. It has one locomotive and four freight cars, two of which are only 5-ton capacity. It has no station buildings, track scales, or other facilities for handling carload or less-than-carload freight. It has put in operation since the hearing a boat and barge, which it uses for hauling ties and stave bolts on the Black River and tributary waters. Its locomotive hauls out one lumber train daily, on an irregular schedule; the tap line carries no passengers.

The logs are floated down the Black River to the mill at Brookings. The lumber is moved by the tap line for a distance of 3 miles to the Iron Mountain. For this service it receives 3 cents per 100 pounds out of the joint rates published by the Iron Mountain, which are 1 cent higher than the rate from the junction point, so that the net contribution by the Iron Mountain out of its revenues is 2 cents per

100 pounds. In addition to the mill of the Quellmalz Company there are three small sawmills, each having a capacity of 10,000 to 15,000 feet daily, which use the facilities of the tap line. Their entire tonnage for the year 1910, however, was but 960 tons, or apparently about 40 carloads. The output of the Quellmalz mill during the same period was approximately 8,000 tons. In addition to the products already referred to, the only traffic handled by the tap line during the year 1910 was 1 carload of corn. Brookings is described as a mill and farm town, with a population of 150, with a company store. While the tap line owns its right of way, the record indicates that practically all the land on both sides of the river is owned by the Quellmalz Company.

CROSSETT RAILWAY.

The mill of the Crossett Lumber Company is at Crossett, Ark., where terminate branch lines of the Rock Island, Iron Mountain, and Arkansas, Louisiana & Gulf Railroads. The lumber company controls, and operates in the interest of its mill, a tap line known as the Crossett Railway connecting with the three trunk lines at Crossett. At the date of the hearing the tap line owned 10 miles of track extending northward, closely paralleling for some distance the rails of the Rock Island; and beyond this track it leased about 5 miles of unincorporated spurs owned by the lumber company. The cost of the tap line, including about 5 miles of so-called terminals in and about the mill and extending to the trunk lines, is stated on the brief at \$120,000. The capital stock of the railroad corporation amounts, however, to but \$25,000, all of which was issued to the lumber company in 1905, when the tap-line corporation was formed, in exchange for 10 miles of track and equipment. The tap line owns 2 locomotives but no cars; it leases 80 logging cars from the lumber company at an annual rental of \$22,500, or an average of more than \$280 per car. The original cost of the cars was less than \$400 and they are kept in repair by the lumber company. The tap line has no salaried employees excepting its trainmen and trackmen and one car inspector. Its officers receive their entire salary from the lumber company, whose clerks are employed by the tap line for an arbitrary charge of \$100 per month, to keep its accounts and perform its clerical services.

The lumber company loads the logs on the cars and hauls them over its private unincorporated spurs to the point of connection with the track that it leases to the tap line; from that point the logs are hauled by the tap line over the leased track and then over the track it owns to the mill, where they are unloaded by the trainmen into the pond. No charge is made by the tap line for this service. The shipments of lumber, for which empty cars are furnished by the

trunk lines, are switched by the tap line from the mill to the Iron Mountain, a distance of one-quarter mile, or one-half mile to the Rock Island. The trunk lines allow out of their earnings from 2 to 4½ cents per 100 pounds, which is intended to cover the movement of the logs into the mill and the lumber out. Under a formal contract with the Rock Island the tap line has agreed to deliver to that company not less than 50 per cent of its outbound lumber tonnage. About 40 per cent is actually delivered to the Iron Mountain and something less than 10 per cent to the Arkansas, Louisiana & Gulf.

The tap line does not carry passengers, but permits persons to ride on its trains without charge; and for the fiscal year 1910 its annual report to the Commission indicates that its entire traffic, amounting to 252,673 tons, was forest products, of which 95 per cent was supplied by the lumber company, and 5 per cent by other persons, who cut their timber on the lands of the lumber company, as the record indicates. The statement on the annual report, however, does not accord with the record, where it is claimed that 19 carloads of merchandise and the same number of carloads of forest products were handled during the year 1910, in which neither the tap line nor the lumber company had any interest. This outside tonnage is said to have increased to 180 cars during the six months ending December 31, 1910. Mention is made on the record of a small mill at Crossett, owned by the lumber company and leased to another lumber company, which purchases its logs from the Crossett Lumber Company and has them hauled in by the tap line. The impression sought to be made by the tap line on the record is that the timber holdings of the Crossett Lumber Company, which had amounted to over 200,000 acres, were nearly all cut, and that therefore "the tonnage of the Crossett Lumber Company will disappear by July, 1911." The fact, however, as disclosed by a careful examination of the testimony, is that the lumber company owns or is contemplating acquiring extensive additional timber holdings south of Crossett, which will be reached by proposed extensions of the line in the opposite direction from that now taken. There remains a large quantity of hardwood which is available for cutting on its lands that have been denuded of yellow pine. It threatens on the one hand that if the Commission holds that the tap line is not a common carrier it will remove and take up its rails and withdraw entirely from the railroad business, because without its interstate business it would be most unprofitable. On the other hand it boasts of large plans for future development; one proposition stated on the record being an extension of a few miles to meet the Wilmar & Saline Railroad, another tap line, with which it would then consolidate, making "54 miles of railway under one management."

Another possibility mentioned is the acquisition of the line by one of the connecting trunk lines.

The reports to the Commission indicate a gross operating revenue for the year 1910 of \$71,745.05, and a net operating revenue of \$35,593.12. After payment of taxes and paying to the lumber company \$5,193.36 for lease of track and \$22,500 for lease of equipment, it had a net income for the year of \$7,643.51, making a total surplus from its operations to June 30, 1910, of \$31,681.46. The officers of the lumber company, through their connection with the tap line, have the benefit of free interstate passes, which they do not hesitate freely to use.

FORDYCE & PRINCETON RAILROAD.

The Fordyce Lumber Company was incorporated in 1890, and erected its mill at Fordyce, Arkansas, about 1 mile from the line of the Cotton Belt System. In the same year and as part of the same investment, the Fordyce & Princeton Railroad Company was organized and laid a track from the Cotton Belt to the plant. When the mill was opened the track was extended northward into the timber for the purpose of hauling logs. From the beginning the tap line has been operated primarily as a facility of the mill. Its main stem runs northward from the mill for a distance of $22\frac{1}{2}$ miles to a point known as Old Junction. It parallels, within a distance of about a mile, the line of the Rock Island, which was subsequently built through Fordyce and crosses the Rock Island near Old Junction. From a point named Cynthiana, where there are two farmhouses, there is a branch 6 miles in length crossing the Rock Island and running to Dobbs Mill, where there is a small hardwood mill, and thence to Trigg, a settlement where the lumber company has a store. This line, from Cynthiana to Trigg, was built by the lumber company and transferred to the incorporated tap line shortly before the hearing for a consideration of \$42,000. The lumber company has an unincorporated logging track connecting with the tap line at Old Junction and several miles of unincorporated spurs in the vicinity of Trigg. The equipment of the tap line consists of 1 locomotive, 4 box and 67 logging cars. The lumber company uses on its unincorporated tracks three Shay geared locomotives.

Mention is made on the record of a stave company which has a mill at Fordyce, and a manufacturer of spokes, handles, and other hardwood products that is erecting a mill at the same point. Neither of these industries, however, is on the rails of the tap line, but they obtain a considerable quantity of logs from the Fordyce Lumber Company. There are also a few small shippers of staves along the tap line. But the tap line runs so near to the Rock Island that any

traffic it receives or originates must necessarily be taken at the expense of the trunk lines. It does not participate in joint rates on any commodities other than lumber outbound and coal inbound. The merchandise, amounting to 265 tons, which it handled during the year 1910, paid the local charge of the tap line in addition to the rates of the trunk line. The shipments of staves and stave bolts moved during the same year for others than the lumber company amounted to 4,288 tons, and it is understood that this moved on a local rate to Fordyce. The traffic of the lumber company itself in the same period amounted to 24,079 tons, of which 264 tons was hay and grain and the rest lumber. The tap line runs two log trains daily in each direction, but does not carry passengers for hire.

The logs are loaded on the unincorporated tracks by the employees of the lumber company, and its locomotives deliver the cars at the junction with the incorporated tap line. They are then taken by the tap line, without cost to the lumber company, to the mill. The tap line moves the lumber from the mill to the line of the Rock Island or Cotton Belt, a distance of about a mile. It receives from the Rock Island divisions ranging from 2 to $4\frac{1}{2}$ cents per 100 pounds, and from the Cotton Belt $2\frac{1}{2}$ to 3 cents. There is a contract between the lumber company, the tap line, and the Rock Island providing for these divisions and requiring the delivery of at least 50 per cent of its traffic to that company. The record indicates that the most of the lumber goes to destinations where the division is 4 and $4\frac{1}{2}$ cents.

The tap line claims to perform a switching service on shipments interchanged between the Cotton Belt and the Rock Island at Fordyce, its revenue in the year 1910 on that account being \$1,145.

The annual report to the Commission indicates the payment of a dividend aggregating \$5,430 during the year 1910. After the payment of this dividend a deficit was created by the writing off of accrued depreciation on road and equipment.

HOMAN & SOUTHEASTERN RAILWAY.

The main track of the Homan & Southeastern Railway Company is 12 miles long and connects with the Iron Mountain at Homan, Ark. The mill that it serves is about 1,000 feet from the Iron Mountain right of way, and is named on the record as Arthur. The other end of the track is in the timber and bears no name. The tap line also operates several miles of logging spurs. Its equipment consists of 2 locomotives, 2 flat and 15 log cars; and one logging train runs daily in each direction, on which passengers are carried free. A special train is sometimes run when a carload of freight other than forest products is offered for movement.

The mill was apparently erected in 1904 by the Kelly Lumber Company, which had previously been in business elsewhere. Shortly thereafter the tap line was built, and was incorporated as the Homan & Southern, having at that time 6 miles of track, that has since been taken up and entirely relocated. In 1906 the Kelly Lumber Company failed, and the Homan Lumber Company took over the property. At the same time the Homan & Southeastern was organized and succeeded the Homan & Southern. In 1909 the mill at Homan and the entire capital stock of the Homan & Southeastern, amounting to \$27,000, was purchased by J. A. Brown & Company, the Homan Lumber Company at that time having cut off most of its timber. The vendees were not prepared to begin logging their own timber, and therefore leased the mill to the Homan Lumber Company, which continued to operate it until December, 1910, when the mill was destroyed by fire. At the time of the hearing it was being rebuilt by Brown. The Homan Lumber Company was itself building a new mill on the Red River about $3\frac{1}{2}$ miles away, and was constructing about a mile of railroad to connect with the Iron Mountain.

There are said to be a number of farms along the tap line and the country is developing. The traffic of the tap line during the year 1910, however, was almost entirely lumber, there being but 306 tons of cotton seed, farm products, and merchandise, the lumber weighing 10,344 tons, with some three or four times that weight of logs moving into the mill. For the fiscal year 1909 the lumber movement exceeded 29,000 tons.

The Homan & Southeastern is a party to joint rates published by the Iron Mountain that are 1 cent higher than the rates from mills on the trunk line itself. The Iron Mountain allows the tap line from 4 to 5 cents per 100 pounds, which includes the arbitrary of 1 cent. On such other traffic as it has the tap line apparently makes a local charge in addition to the Iron Mountain's rate. While the mill was in operation the logs were hauled to it by the tap line without charge against the lumber company; and the lumber was switched by the tap line for a distance of about 1,000 feet from the mill to the Iron Mountain.

The Homan & Southeastern does not file annual reports with the commission.

LITTLE ROCK, SHERIDAN & SALINE RIVER RAILWAY.

The Little Rock, Sheridan & Saline River Railway Company was chartered in February, 1892, and is owned by the William Farrell Lumber Company, as is admitted of record. The track of the tap line is narrow gauge and runs from mill at Farrell, Ark., to a point in the timber known as Craig's Mill, a distance of 17 miles. The

equipment consists of 3 locomotives and 36 cars. There are unincorporated logging spurs owned by the lumber company which it operates with engines furnished by the tap line at a charge of \$20 per day, including fuel and the crew. The tap line hauls the logs to the mill and charges the lumber company \$4 per car. This, however, is later refunded when the lumber is shipped out. The sawmill is about 200 yards from the main track of the Iron Mountain; the planer is somewhat less distant. But apparently all of the manufactured lumber, whether planed or undressed, is switched by the Iron Mountain from the mill. The tap line receives an allowance of 4 or 5 cents per 100 pounds out of the Iron Mountain's rates.

The timber holdings of the lumber company are in the vicinity of Craig's Mill, where the logging spurs are laid, and aggregate about 54,000 acres. The traffic handled for others than the lumber company amounted, during the fiscal year 1910, to only 110 tons, and consisted of feed and general merchandise, while the lumber shipped by the Farrell Lumber Company exceeded 41,000 tons. The log movement averages 10,000 cars per annum.

The capital stock issued and outstanding amounts to \$125,000; and in addition the Farrell Lumber Company holds bonds in the tap line to the amount of \$75,000. The surplus on June 30, 1910, was \$14,290.01, accumulated since 1907.

L'ANGUILLE RIVER RAILWAY.

The L'Anguille River Railway consists of 1.7 miles of track, laid in what is described on the brief as a general circular direction from the right of way of the Iron Mountain in the town of Marianna, Ark., to the bank of the L'Anguille River, where the mills of the Indiana-Arkansas Lumber & Manufacturing Company and the Miller Lumber Company are in operation. The stockholders of those companies own all of the stock, amounting to \$10,000, in the tap line. It is stated of record that one "station" on the road is the loading point of the Indiana-Arkansas Company, one is the loading point of the Miller Lumber Company, and the other "station" is the loading point of the McDonald Company. The tap line has two locomotives, and it uses cars furnished by the Iron Mountain. No passengers are carried, but it has some miscellaneous freight that is brought in by a packet line and which it switches over to the Iron Mountain. There is also a small brick plant that furnishes some traffic. Altogether for the year 1910 it moved 223 carloads, or 5,671 tons, of miscellaneous freight, on which it received earnings of \$2,458.14, made up for the most part of local charges paid by the shippers. For the same period the traffic of the Indiana-Arkansas Company aggregated 631 cars, on which its revenues were \$5,893.74, while the tonnage of the

Miller Lumber Company amounted to 552 cars, on which the revenue was \$5,706.04.

The logs that are cut by the mills are floated down the river or brought in by barges and steamers. For the movement of the lumber from the mills the Iron Mountain makes an allowance of 2 cents per 100 pounds out of its rate from Marianna. The only joint rates are on forest products, and on other commodities, such as brick and coal, the tap line is content to receive a switching charge of \$3 per car, or \$5 per car on cotton, which apparently is not absorbed by the Iron Mountain but is paid by the shipper.

The tap line was incorporated in 1902. It makes annual reports to the Commission, from which it appears that the salaries to its officers exceed \$6,000 per annum.

OUACHITA VALLEY RAILWAY.

The Ouachita Valley Railway connects with the Cotton Belt at Millville, Ark., where the mill of the Freeman-Smith Lumber Company is situate, and runs in a southeasterly direction for a distance of 28 miles to Stark, where it joins the Rock Island Railroad. A good deal is said on the record of proposed extension of the line to reach certain towns and farming country. There are said to be one or two small settlements and a few farms on the line, but the freight in which the lumber company was not directly interested amounted to but 450 tons for the eighteen months ending December 31, 1910. There are a number of miles of unincorporated logging track connecting with the tap line. The tap line itself is laid with a light 30-pound rail, but it owns its right of way. It has 5 locomotives, 2 cabooses, a motor car, and 70 logging cars. One mixed lumber and logging train runs daily in each direction between Millville and Stark; its passenger revenue for 1910 amounted to \$764.54.

The tap line was originally built by the lumber company nearly 20 years ago; and upon its incorporation in 1904 the track and equipment was transferred to the railroad company in exchange for its capital stock, amounting to \$100,000, which was thereupon distributed among the shareholders of the lumber company as a dividend.

The logs are hauled by the tap line from the loading point on the unincorporated tracks to the mill and are unloaded at the mill by the trainmen. A charge of \$4 per car is made against the lumber company, which is supposed to include the expense incurred by the tap line in laying and changing the logging spurs. The mill is at the junction with the Cotton Belt which places the empties and takes away the loaded cars moving over that route. The greater proportion of the tonnage, however, is delivered to the Rock Island, requiring a haul by the tap line of the empty and loaded cars of 28 miles from

the mill to Stark. When the Rock Island built into the country, in 1906, it entered into its standard form of contract with the Ouachita Valley Railway, requiring the routing of 50 per cent of its traffic over that trunk line and stipulating for the payment of a division of from 2 to 5 cents per 100 pounds. The Cotton Belt allows from 1 to 2½ cents per 100 pounds. The excess of the Rock Island divisions therefore seems to be sufficient to induce a 28-mile movement by the tap line in preference to direct delivery to the Cotton Belt. There are also joint commodity rates with the Rock Island on fertilizer, hay, feed, and coal, but on most of the miscellaneous traffic, amounting only to 259 tons in 1910, local rates are apparently charged.

SOUTHERN PINE SYSTEM.

The so-called Southern Pine System seems to be an informal association of four tap lines, two of which, known as the Griffin, Magnolia & Western Railway Company and the Saline Bayou Railway Company, are Arkansas corporations, and the others, namely, Enterprise Railway Company and Natchez, Ball & Shreveport Railway Company, are located in the state of Louisiana. The precise relationship between the four companies as respects their ownership or control is not definitely disclosed of record; but the fact is not important. The four properties are similar in many respects, and their methods of doing business do not differ materially.

The Griffin, Magnolia & Western is controlled by the stockholders of the Louis Werner Saw Mill Company, and its main track, 18 miles in length, connects with the Iron Mountain at Griffin, Ark. The other end of the line is referred to on the record as Graham, but is named on the annual report to the Commission as Junction. There are about 7 miles of logging branches. The tap line has capital stock to the amount of \$50,000 and no bonds. Its equipment consists of 3 locomotives, 1 caboose, 2 coal cars, and 25 flat cars, used for hauling logs. The lumber company has neither locomotives nor cars of its own; nor are there any unincorporated logging tracks.

Both the sawmill and the planing mill of the Werner Company are reached by the tracks of the Iron Mountain at Griffin; and the usual practice is for the Iron Mountain to spot the empty cars and take the loaded cars directly from the mill without assistance by the tap line. The tap line hauls the logs to the mill, making a charge against the lumber company of \$1.50 per 1,000 feet for the service on the logging spurs up to Junction or Graham; its compensation for the movement of the logs from that point to the mill is the division of the through rate allowed it by the Iron Mountain, which varies from 2 to 5 cents per 100 pounds. It is said that the logs of the Werner Sawmill Company constitute only 65 per cent of

the total tonnage of the road. There seem to be one or two other small mills on the line and a number of shippers of staves. The latter pay the local charge of the tap line in addition to the regular charges of the Iron Mountain. A considerable quantity of logs, chiefly hardwood, moves over the tap line to Griffin, and from there is hauled by the Iron Mountain to sawmills along its lines, one of the mills apparently being 300 miles distant. These logs are said to be cut from timberland in which the lumber company is not interested and which is reached by the logging spurs of the tap line; the tap line charges the regular Arkansas log rate for the entire distance from the loading point on the logging spurs to the junction with the Iron Mountain. For the fiscal year 1910 more than 99 per cent of the traffic of the tap line was forest products, which amounted in the aggregate to 59,740 tons. There were 200 tons of farm products and 318 tons of merchandise and miscellaneous freight. No charge is made for carrying passengers.

The first 5 miles of the Griffin, Magnolia & Western was originally built as an unincorporated logging road by a lumber company which subsequently failed. The tap line was incorporated in 1905. Its annual report to the Commission for the year 1910 shows freight revenues of \$29,547.56 and a net loss from operation, on June 30, 1910, of \$6,097.45. Mention is made of proposed extensions to El Dorado and Champion, which, if constructed, would involve the crossing and paralleling of several other tap lines now built or which have plans of building in that territory.

The Saline Bayou Railway Company was chartered in June, 1905, under the Arkansas law, and its capital stock, amounting to \$30,000, is held by the stockholders of the Oak Leaf Mill Company. The sawmill is reached by the tracks of the Iron Mountain, and the tap line performs no service on the manufactured lumber. The rails of the tap line extend from the mill at Oak Leaf, Ark., for a distance of 14 miles into the timber, with several miles of incorporated logging spurs. It has two locomotives and a number of logging cars, but no box cars or other equipment for miscellaneous traffic. About 95 per cent of the tonnage consists of the logs of the lumber company. An insignificant amount of general merchandise and farm products is moved for settlers and there is a small movement of hardwood logs. It has no passenger service.

The logs are loaded on the cars by the employees of the tap line; the method of hauling them to the mill is similar to that employed on the Griffin, Magnolia & Western; and the same charge of \$1.50 per 1,000 feet is made by the tap line for the service on the logging spurs. The divisions received from the Iron Mountain range from $1\frac{1}{2}$ to 5 cents, the average being 3 cents per 100 pounds, the shipping-point rate being in effect from all points on the tap line.

The reports filed with the Commission indicate that the tap line is operated at a slight loss, and the statement made on the brief is that the deficit is met by the Oak Leaf Lumber Company.

The Enterprise Railway Company was incorporated in 1903, and operates 12 miles of standard-gauge track connecting with the Iron Mountain at Simms and penetrating the timber of the Enterprise Lumber Company, whose mill is located on the tracks of the Iron Mountain in Alexandria, La. The tap line has trackage rights from the junction of its own rails at Simms over the Iron Mountain to the mill at Alexandria, this right being limited to the operation of logging trains at a charge of 50 cents per train-mile. The tap line has 4 locomotives and 71 cars. The lumber company has no equipment. The tap line builds and maintains spurs into the timber wherever required for logging operations. The tap line hauls the logs all the way from the loading point in the woods to the mill at Alexandria; and a charge of \$1.50 per 1,000 feet is made against the lumber company for the expense of maintaining the logging spurs, hauling the logs over them, and the unloading of the logs at the mill. The trunk line switches the manufactured product from the mill and pays the tap line a division of from 2 to 5 cents per 100 pounds out of the joint rates which are published as applying from Clear Creek, the terminus of the tap line in the woods.

The tap line has an inconsiderable traffic in merchandise and miscellaneous freight, and the revenue from the staves and hardwood which it moves for others than the lumber company amounts to but 3 or 4 per cent of its total revenue. The only through rates in which it participates are those on yellow-pine lumber, all other freight paying a local charge to Simms in addition to the rates of the Iron Mountain.

The operations of the tap line appear not to have been profitable, and the lumber company has supplied more than \$100,000 to meet operating deficits.

The J. F. Ball & Brother Lumber Company has two mills, located, respectively, at Pollock and at Ball, in the state of Louisiana, being points on the line of the Iron Mountain, a short distance north of Alexandria. Simms, the junction point of the Enterprise Railroad with the Iron Mountain, is between Pollock and Ball. Each of the mills of the lumber company is served by the tracks of a tap line, which is known as the Natchez, Ball & Shreveport Railway Company, and is controlled by the lumber company. In other words, the tap line is built in two sections, one connecting with the Iron Mountain at Pollock and the other connecting with the Iron Mountain at Ball. The aggregate of the tracks is 34 miles, and at Dry Prong the tap line connects with the Louisiana & Arkansas Rail-

road, over which the Rock Island lines have trackage rights. The equipment consists of 4 locomotives, about 70 flat cars, and 2 cabooses, 27 of the flat cars being leased from the Iron Mountain for a per diem charge.

The record indicates that the tap line was built through an unbroken forest. It does not carry passengers; and its tonnage consists very largely of forest products, of which more than 95 per cent is supplied by the mills of the Ball company. The record is silent as to the manner in which the lumber is handled from the mills, which are located within a few hundred feet of the Iron Mountain, but our own investigations indicate that the cars are switched by the Iron Mountain. As the tap line seems not to enjoy allowances or divisions from the Rock Island or Louisiana & Arkansas, we infer that little if any tonnage is delivered to those companies. The divisions paid by the Iron Mountain out of its earnings range from $1\frac{1}{2}$ to 5 cents per 100 pounds. As on the other three lines composing the Southern Pine System, the logs are hauled by the tap line from the point where they are loaded on the logging spurs to the mill and a charge of \$1.50 per 1,000 feet is made for the service on the logging spurs.

The Natchez, Ball & Shreveport has not filed annual or other reports with the Commission, nor has it published any tariffs that are on file with the Commission.

BLACK BAYOU RAILROAD.

The Black Bayou Railroad Company was organized in 1904 and was operated in the interest of the small sawmill of the Black Bayou Lumber Company. The record indicates that the lumber company got into financial difficulties as a result of the panic of 1907 and was compelled to cease operations. The Southern Lumber Company subsequently purchased the assets and reorganized the tap line corporation, which had forfeited its charter. Capital stock was issued to the amount of \$50,000, in addition to which the tap line owes the Southern Lumber Company about \$1,000. The tap line was thereupon rebuilt in a more substantial form and relocated to run in another direction, the 35-pound steel being replaced with 60-pound steel, which apparently is leased from the Kansas City Southern Railway Company.

The equipment consists of 1 locomotive, 1 construction car, and 26 logging cars. There are no station buildings or other facilities. Its employees consist of one train crew, one section gang, and a construction gang. The record states that no salaries are paid to its officers, who are also officers of the lumber company and who enjoy the privilege of free passes over the Kansas City Southern. The first annual report made to the Commission, however, for the fiscal year 1911, shows that the officers have since been placed on salary.

The Black Bayou Railroad connects with the Kansas City Southern at Myrtistown, La., and extends into the timber for a distance of 7 miles, crossing the state line into Texas. In addition to this track there are logging spurs aggregating over 8 miles in length constructed by the tap line. The mill of the lumber company is apparently at the junction between the tap line and the Kansas City Southern, and the Kansas City Southern places the empty cars and switches the loaded cars from the mill. There are joint rates on lumber out of which the Kansas City Southern allows the tap line from 1 to 4 cents per 100 pounds, which is, of course, intended to cover the movement of the logs into the mill. In addition to this compensation the tap line charges the lumber company, for the construction and operation of the logging spurs, an arbitrary amount, which is apparently determined periodically and is sufficient to make the road show net earnings. For the year 1911 this charge seems to have been \$5 per log car. The record describes the traffic of the tap line as consisting wholly of logs and camp supplies transported for the Southern Lumber Company. The annual report for the fiscal year 1911 seems to verify this fact. There is no regularity of train service, but about four trainloads of logs are handled each day. It does not carry passengers.

The annual report to the Commission is somewhat informal in character and indicates that the disbursements of the tap line are made through the lumber company.

BODCAW VALLEY RAILWAY.

The Bodcaw Valley Railway Company was incorporated in 1904 and has capital stock outstanding to the amount of \$67,000. Its tracks extend from a connection with the Cotton Belt at Alden Bridge, Louisiana, in an easterly direction for about 24 miles. It is owned by the Frost-Johnson Lumber Company, which acquired the tap line when it purchased the mill and timber of the Whited & Wheless Lumber Company; no separate or specific amount was paid for the railroad and equipment.

The Bodcaw Valley is remarkable in the fact that it receives from the Cotton Belt an allowance of from 1 to 2½ cents per 100 pounds out of the rate, although it neither hauls the logs to the mill nor performs any service on the finished product from the mill. The mill of the lumber company is located on the tracks of the Cotton Belt, which places the empty cars at the loading platform and moves the carloads of lumber away. The tap line conducts no train operations, its tracks from the timber to the mill being used by the Smyth Logging Company, which is also subsidiary to the Frost-Johnson Lumber Company, for the movement of logs to the mill. For this

purpose the logging company leases the equipment of the tap line and pays a yearly rental for the tracks. Such is the testimony appearing of record, although the annual report indicates that the tap line has several trainmen. The entire traffic as reported to the Commission consists of logs, amounting for the year 1910 to 78,592 tons.

This tap line yields a substantial profit to its owners, having paid during the year 1910 a dividend of 20 per cent on the stock, its net operating revenue for that year being \$7,140. Apparently the bills for the allowances are sent to the Cotton Belt by the lumber company, and the cash accruing under the settlements passes to the lumber company.

MILL CREEK & LITTLE RIVER RAILWAY.

The Mill Creek & Little River Railway & Navigation Company is controlled by the stockholders of the Little River Lumber Company, which furnishes its entire traffic, consisting, for the year covered by this record, of 52,425 tons of logs and lumber and 197 tons of merchandise. It is admitted on the brief that the two companies are one and the same investment, and that there is no outside traffic. The country traversed is hilly, with very few settlers, for whom the tap line does not, in fact, carry any products or supplies. The mill is at Manistee, La., on the tap line about 3 miles from the junction with the Iron Mountain. This is purely a mill town, of about 300 inhabitants and a company store. The construction of the tap line was begun in August, 1905, by the lumber company, and about 6 miles were built the first year. In November, 1905, the tap-line corporation was formed, but it did not take title to the railroad property until 1908. There are 10 miles of incorporated track, lightly constructed with 35-pound rails, of which 8 miles is on land owned by the lumber company, the tap line itself owning no right of way. The lumber company also has several miles of unincorporated logging spurs, the rails in which are owned by the tap line. The equipment of the tap line consists of 2 locomotives and 12 logging cars.

For the movement of the logs to the mill the tap line makes a charge of \$4 per car against the lumber company; and this includes the operation of the unincorporated spurs. It also includes the unloading of the logs into the mill pond by employees of the tap line. The tap line switches the empty cars furnished by the Iron Mountain from the junction point known as Bryant's spur to the mill, a distance of 3 miles, and switches the loaded cars the same distance back to the Iron Mountain. For this service a division of 2 cents per 100 pounds is allowed out of the rates, which are the same from the mill as from originating points on the Iron Mountain proper.

It is interesting to observe that for several years there was a mill in operation at Manistee which brought in its logs by ox carts and reached the Iron Mountain with its lumber over a wooden tram operated by mule power. The mill was compelled to suspend operations with the cutting away of the timber standing within a distance that could be logged profitably by wagon. The present owners purchased the property and constructed the tap line.

The intention of the lumber company seems to have been to acquire barges or other floating equipment and thus move forest products on the river. This intention is expressed in the corporate title of the tap line, but has not been made effective.

RED RIVER & ROCKY MOUNT RAILWAY.

The mill of the Antrim Lumber Company is adjacent to the right of way of the St. Louis Southwestern Railway, known as the Cotton Belt, at Antrim, La., and has been in operation for about 16 years. During practically all of that period it has brought in its logs over a tram road which was incorporated in May, 1904, as the Red River & Rocky Mount Railway Company, but which had been receiving divisions out of the through rate prior to that date. The tap line consists of 12 miles of standard gauge track extending westward from the mill to the timber and about three-fourths of a mile of track crossing the Cotton Belt and running to the eastward; all of the track is laid with light 35-pound steel, and title to the right of way is in the name of the tap line. The lumber company has a short unincorporated logging spur which is operated for it by the tap line. The equipment of the tap line consists of 3 locomotives and 30 loggings cars. There are 3 train crews. The entire tonnage of the road consists of logs handled for the lumber company from the timber to the mill, at a charge of 40 cents per ton, which apparently is not refunded, although the rates published by the Cotton Belt and participated in by the tap line are apparently on a milling-in-transit basis. In addition to this charge on the logs the tap line receives from the Cotton Belt an allowance out of the published rate of from 1 cent to 2½ cents per 100 pounds. The lumber, however, is loaded by the lumber company into cars furnished and placed at the mill by the Cotton Belt, which also takes the loaded cars away. In other words, the tap line performs no service in connection with the movement of the finished lumber.

The capital stock of the tap line amounts to \$64,000, which was issued to the stockholders of the lumber company as a dividend. We find of record an admission that when the timber is cut away the rails may be taken up and the tap line abandoned. On the other hand it is contended that the development of the Caddo oil fields may furnish new traffic for the tap line.

WOODWORTH & LOUISIANA CENTRAL RAILWAY.

The Woodworth & Louisiana Central Railway serves the mill of the Rapides Lumber Company at Woodworth, Louisiana, a station on the Iron Mountain railroad which has a spur track to the mill. The tap line and lumber company are identical in interest with the same principal officers. The tap line has a standard-gauge track extending from the mill eastward for six miles to La Moria, Louisiana, connecting with the Southern Pacific, Texas & Pacific, and Rock Island lines. Its main track, however, is narrow gauge and runs from the mill westward for 18 miles to a point from which unincorporated tracks extend into the timber. The right of way for the narrow-gauge track is leased from the lumber company; but the steel in the unincorporated logging spurs, on the other hand, is owned by the tap line and leased to the lumber company, as are four narrow-gauge locomotives which the lumber company utilizes in the operation of the logging spurs. The equipment of the tap line consists of 1 standard-gauge locomotive, 5 narrow-gauge locomotives, and 2 standard and 9 narrow-gauge cars. The logs are hauled from the end of the incorporated track to the mill by the tap line without charge against the lumber company and are dumped into the mill pond by the trainmen. The standard-gauge locomotive of the tap line switches the carloads of lumber from the planing mill to the point from which they are taken by the Iron Mountain, a distance, as the record indicates, of only 25 feet, or less than a car length. About 95 per cent of the lumber moves through La Moria, being switched to that point, a distance of six miles, by the tap line. The explanation doubtless lies in the fact that the allowances from the Iron Mountain out of the through rates run from $1\frac{1}{2}$ to $5\frac{1}{2}$ cents, while the trunk lines connecting at La Moria allow from 2 to $5\frac{1}{2}$ cents. There are no joint rates except on lumber. The record indicates that 40,707 tons of freight was handled for the lumber company during the fiscal year ending June 30, 1910, and that there was 2,100 tons of outside traffic, consisting of merchandise, farm products, and miscellaneous material. It does not appear what proportion of this tonnage was intended for employees of the lumber company. There is no passenger service.

The Woodworth & Louisiana Central was incorporated in 1900, with a capital stock of \$25,000. It has no bonds, but is indebted to the lumber company in the sum of \$88,000 and to a bank in the amount of \$10,000. Its operations for the year ending June 30, 1910, resulted in a deficit; but there was a surplus on that date, resulting from previous years, amounting to nearly \$10,000. It files annual reports with the Commission.

FREEO VALLEY RAILROAD.

The record indicates that the sawmill and planing mill of the Eagle Lumber Company at Eagle Mills, La., have been in operation more than 25 years and are served by short spur tracks connecting with the rails of the Cotton Belt. The logs are brought into the mill over a track about 22 miles in length, most of which was constructed a few years after the building of the mills, and which was incorporated in 1904 as the Freeo Valley Railroad Company. When this corporation was formed the lumber company declared a dividend that was utilized by its stockholders in securing shares in the tap line. The two corporations are identical in interest, and with one exception their officers are the same. Beyond the incorporated track already referred to, which terminates at a point known as Princeton junction, there is about 17 miles of unincorporated tracks owned by the lumber company itself. The first $2\frac{1}{2}$ miles of this track, however, seems to be treated as a part of the incorporated line to the extent that the tap line runs logging trains for that distance to a town known as Princeton, which had a population of about 400, and seems once to have been a county seat. The first 3 miles of the line out of Eagle Mills extends through pine land, the next 7 miles through a farming country that has been cut over by the lumber company, and the remainder through timber which when cut over will be available only for orchard purposes. The tap line has no equipment of its own, but uses 2 locomotives, 61 logging cars, and 1 other car that belong to the lumber company, no charge being made therefor.

The tap line moves the logs over the unincorporated track from Princeton to Princeton junction, and thence over its own rails to the mill, where they are unloaded by the trainmen. For the service over the unincorporated track from Princeton to Princeton junction, and the unloading, the lumber company pays the tap line \$2 per car. The trunk line spots the empties at the mill and takes away the loaded cars of lumber. It pays the tap line a division of from 1 to $2\frac{1}{2}$ cents per 100 pounds out of the joint rates on yellow-pine lumber, which are the same from Princeton junction as from Eagle Mills.

The tap line does not carry passengers and it has very little traffic other than forest products. During the year 1910 it is estimated that the logs moved for the lumber company aggregated in weight about 108,000 tons. Mention is made on the record of 15 carloads of fertilizer hauled for various farmers during that year, and it is said that the merchandise and miscellaneous freight, including this fertilizer, amounted to 5,524 tons. Its report to the Commission, however, shows only 718 tons of agricultural products,

of which 589 tons were inbound hay and grain, 1,220 tons of coal and other mine products, and 115 tons of merchandise and manufactured articles. Its report for the year 1911 shows a total traffic exclusive of forest products of 2,053 tons.

There is one yellow-pine mill on the line and a small hardwood mill which is engaged exclusively in cutting ties, but their tonnage added to the traffic of the farmers and settlers on the line was so small, as compared with the tonnage of the lumber company, as to make during the year covered by the record less than 10 per cent of the total movement of the tap line. Moreover, it will be noted that the hardwood mill pays a flat rate of \$15 per car to the tap line in addition to the rate of the Cotton Belt from the junction point. There are no joint through rates on class and commodity freight.

The annual reports to the Commission indicate substantial net operating revenues and a surplus on June 30, 1910, of nearly \$50,000, a large portion of which had been actually expended in extensions and betterments. Previous to February, 1911, no charge was made for less-than-carload movements of merchandise.

NATCHEZ, URANIA & RUSTON RAILWAY.

The Natchez, Urania & Ruston Railway is controlled by the stockholders of the Urania Lumber Company through ownership of the entire capital stock. The two companies are one investment and the officers are identical.

It extends from a connection with the Iron Mountain at Urania, La., into the timber about 14 miles. The road was originally constructed in 1899 by the Urania Lumber Company as a private logging road. It was incorporated March 29, 1902, under the laws of Louisiana, with a capital stock of \$100,000, of which \$50,000 has been issued for the purchase of the road from the lumber company. This purchase only covered the steel, ties, and equipment, the lumber company retaining the title to the right of way. There are no bonds.

The equipment consists of 2 locomotives and 24 cars. The lumber company owns no equipment or motive power.

The mill of the lumber company is located at Urania, about 300 yards from the connection with the Iron Mountain. There are no other mills in operation on the line. The lumber company owns about 50 per cent of the timber tributary to the tap line. There is no other timber owned in sufficient quantities to justify a mill operation.

The tap line constructs and maintains short logging spurs into the timber, and loads the logs upon the cars and hauls them to the mill, where they are unloaded into the log pond by the train crew. For the entire service a charge is made against the lumber company of \$1.50 per 1,000 feet, which, it is stated, only covers the keeping up of

the logging spurs, the loading of the logs, and their delivery at the main incorporated track of the tap line.

The Iron Mountain handles the empty and loaded cars between the mill and the junction with its main line, using the tracks of the tap line. The tap line receives divisions from the Iron Mountain of from 2 cents to 4 cents per 100 pounds out of the through rates on lumber. The divisions have been received since the original construction of the road and were not changed after the incorporation.

The tap line has no passenger, mail, or express service, but a few passengers are carried free of charge. It handles no logs for others than the controlling lumber company. The only outside traffic consists of stave bolts and ties. A small amount of farm products and general merchandise is handled free of charge, as the record indicates. No revenue is derived from operation other than that accruing from the movement of logs and lumber for the controlling interests except a small revenue for the movement of staves and ties for the public, for which a charge of \$15 per car is made.

The tap line does not file annual reports with the Commission. It is admitted that the net earnings in 1909 were in excess of \$10,000, and that the net revenue for the fiscal year ending June 30, 1910, was about 15 per cent on an investment of \$70,000.

BERNICE & NORTHWESTERN RAILWAY.

The Bernice & Northwestern Railway Company is controlled by the interests that own also the Bernice Lumber Company and the Dubach Lumber Company, and the three companies have the same principal officers. Each of the lumber companies has a mill on the tap line.

The Bernice & Northwestern has two separate tracks. One was constructed by the Bernice Lumber Company in 1902, for bringing the logs to its mill on the Rock Island in Bernice, and extends for a distance of 15 miles to a point known as Summerfield; beyond Summerfield there are 9 miles of unincorporated logging track of the Bernice Lumber Company. The other section of the tap line connects with the Rock Island at Dubach, and runs for 11 miles to Cunningham, where a connection is made with the unincorporated track 9 miles in length used by the Dubach Lumber Company, whose mill is also on the Rock Island, at Dubach. The tap line has 3 locomotives, 4 flat cars, and 64 logging cars. It was incorporated in 1908, for the purpose, as is admitted, of getting divisions.

On each of the sections of the tap line the logs are loaded by the lumber company and hauled over the logging tracks to the junction with the incorporated line. They are then taken by the tap line to the mill for a charge of \$5 per car, which is subsequently refunded by the tap line when the lumber is reshipped.

At both mills the Rock Island spots the empties and takes away the loaded cars, so that the tap line performs no service with respect to the manufactured lumber. It receives, however, an allowance from the Rock Island of from 1 to 4 cents per 100 pounds on lumber. There are no regular trains on either division; and the tap line does not carry passengers. Its total freight traffic for the year 1910 was 86,611 tons, of which 72,388 tons was lumber for the controlling interests.

The Bernice & Northwestern files annual reports with the Commission, and claims otherwise to comply with the act.

DORCHEAT VALLEY RAILROAD.

The Dorcheat Valley Railroad was constructed by the Porter-Wadley Lumber Company as a private logging road in 1905, and was incorporated in the following year with a capital stock of \$75,000, which was issued to the stockholders of the lumber company. The two companies have the same officers. The tap line extends from a connection with the Louisiana & Arkansas, at Cotton Valley, La., to Gleason, a distance of about 6 miles, and has 20 miles of logging spurs through the timber which are moved from time to time to meet the logging requirements. These tracks are constructed and moved without expense to the lumber company. The equipment consists of 5 locomotives and 60 logging cars.

The mill of the lumber company is on the tap line about one-quarter of a mile from the track of the Louisiana & Arkansas. The logs are hauled in by the tap line and the lumber is switched by it to the trunk line. For the service on the logging spurs the lumber company pays \$1.25 per 1,000 feet, logging scale. Out of the joint rates on lumber the tap line receives from the trunk line a division of 3 or 4 cents per 100 pounds, being one-half the proportion of the through rates that the Louisiana & Arkansas itself receives.

There are no other sawmills on the line, but there is a small stave mill and a handle factory. The outside traffic for the year covered by the record included but 746 tons of feed, fertilizer, and general merchandise; there were 5,100 tons of staves; and the lumber traffic aggregated 29,000 tons. No revenue is shown for carrying the persons who are permitted to ride on the logging trains.

The annual report to the Commission for the year 1910 shows an operating revenue of \$53,375.42. The operating expenses for the same year were \$48,680.89, which included substantial sums expended in moving the logging spurs.

MANGHAM & NORTHEASTERN RAILWAY.

The track of the Mangham & Northeastern Railway Company was originally constructed as a private logging road. It was incorporated
23 I. C. C.

in 1905 with a capital stock of \$50,000, of which \$30,000 has been issued, and is in the hands of the stockholders of the Stewart-Greer Lumber Company. The tap line owes \$12,000 to the lumber company, and the two companies have the same officers.

The tap line extends from a connection with the Iron Mountain at Mangham, La., in a northeasterly direction 6 miles to Big Creek. It has 2 locomotives, 1 box car, and 23 logging cars. The tap line lays, maintains, and operates logging spurs for the lumber company, and makes a charge on that account of $1\frac{1}{2}$ cents per 100 pounds for the logs hauled to the mill, which is about 1 mile from the Iron Mountain. The tap line switches the lumber from the mill to the trunk line, and receives for the latter an allowance of from 2 to $3\frac{1}{2}$ cents per 100 pounds out of the junction-point rate. All but 1 per cent of the traffic for the year 1910 was supplied by the lumber company. The record shows that the tap line is wholly dependent upon the mill, and during the year 1908, when the mill was shut down, the tap line discontinued all train service.

PEACH RIVER LINES.

The three tap lines of the Miller-Vidor Lumber Company, the corporate names of which are Galveston, Beaumont & Northeastern Railway Company, Peach River & Gulf Railway Company, and Riverside & Gulf Railway Company, respectively, comprise a "system" known as the Peach River lines. The first named of these companies was incorporated March 2, 1906, and has capital stock to the amount of \$100,000, of which \$93,000 is held in trust as collateral security for bonds issued by the lumber company on certain of its timber lands. The Peach River & Gulf was incorporated in March, 1904, and has capital stock to the amount of \$100,000. The Riverside & Gulf was incorporated in April, 1907, and has a capital stock of \$50,000. All three companies are controlled by the Miller-Vidor Lumber Company, whose timber lands and sawmills they serve. It is important to observe that neither of them is recognized by the authorities of the state of Texas as common carrier by railroad, and they therefore do not participate as such in joint rates on intrastate traffic.

The testimony is that each of the lines published tariffs, but although copies of local schedules bearing I. C. C. numbers are on the record, the records of the Commission do not disclose that those tariffs have been filed with the Commission in the manner required by section 6. Annual reports, however, have been filed, and it is said that the accounts are kept in accordance with the rules of the Commission. The disbursements of each of these tap lines, however, are made by the lumber company, which handles all the cash, the tap lines having no individual bank accounts. In other words, their financial matters are simply bookkeeping transactions.

The Galveston, Beaumont & Northeastern has 9 miles of main track running southward from a point in the timber known as De Sanque to Vidor, Tex., where it connects with the Texarkana & Fort Smith Railway, over which it has trackage rights for a distance of 8 miles through Beaumont to Chaison. The trackage contract entered into in 1908 is in evidence and limits the use of the track by the tap line to the "hauling of company material in carload lots, with its own cars and engines"; this is apparently intended to mean the logs of the lumber company. A wheelage charge of \$27.50 per train of 15 cars, equivalent to \$1.83 per car, is made by the Texarkana & Fort Smith. From Chaison a joint track about $1\frac{1}{2}$ miles in length extends to the plant of the Beaumont Sawmill Company, one of the Miller-Vidor corporations, on the bank of the Neches River. For the use of this track the tap line pays the Texarkana & Fort Smith about \$105 per month. The equipment of this tap line consists of 2 locomotives, 40 flat cars, and 1 caboose. It has two train crews and one section gang. The logging spurs are apparently constructed, maintained, and operated by the tap line.

The record indicates that the entire traffic of the Galveston, Beaumont & Northeastern consists of logs and lumber handled for the controlling interests, and this is verified by its annual reports to the Commission, which shows neither passenger nor express revenue, nor any tonnage other than forest products. The logs are hauled by the tap line from the timber over the tracks heretofore described to the mill, where they are unloaded by its trainmen into the river. For this movement of the logs the tap line on its books makes a charge of \$3 per car against the lumber company, and no part of this charge is refunded. The tap line also switches the cars for lumber shipments between the mill and the track used for interchange with the Texarkana & Fort Smith, a distance of $3\frac{1}{2}$ miles; and for this service it receives out of the published rate to interstate points an allowance of $1\frac{1}{2}$ to 4 cents per 100 pounds. On intrastate traffic the allowance is uniformly \$1.50 per loaded car.

The Peach River & Gulf connects with the Gulf, Colorado & Santa Fe at Timber, Tex., and extends southeasterly for a distance of 10 miles to Midline, where it crosses the Houston East & West Texas Railroad, and terminates at Bartle, 1 mile beyond. It also has one short branch connecting with its main line at a point $5\frac{1}{2}$ miles from Timber, known as Lincoln. The burning of a bridge on that section some time prior to the hearing resulted in the suspension of train service between Lincoln and the Houston East & West Texas, and it was said on the hearing that the bridge would not be rebuilt until the determination in this case of the legality of its allowances. The tracks were laid by the Santa Fe at the expense of the tap line and are standard gauge, with 35 and 40 pound steel. Its equipment con-

sists of 3 locomotives, 30 freight cars, and 1 coach; the cars are not equipped with safety appliances. It has 2 train crews and 1 section gang, and operates, as the record indicates, a daily train on regular schedule, and while the passenger coach seems to be attached to this train the road has no passenger earnings, which indicates that no charge is made for such persons as may be carried. Its entire revenues accrue on the logs and lumber of the Miller-Vidor Lumber Company, there being no other inbound or outbound freight of sufficient consequence to be mentioned on the record or on its reports to the Commission.

The mill of the Miller-Vidor Lumber Company is located at the junction with the Santa Fe at Timber, and while the spur track to the loading platform is owned by the tap line, the Santa Fe spots the empties and switches the loaded cars. The tap line formerly switched the lumber to the Houston, East & West Texas, a distance of 12 miles, when it was in receipt of divisions. But it has had no allowances either from the Santa Fe or the Southern Pacific since August, 1908. Prior to that time it received 1 and 2 cents per 100 pounds. Its witness testified that it would be to the interest of the lumber company to have the Santa Fe haul the lumber direct from the mill rather than for the tap line to haul the lumber 12 miles to the Houston, East & West Texas for a division of 2 cents per 100 pounds. The Peach River & Gulf hauls logs over the logging spurs, which it constructs and maintains, and thence over its main track to the mill, for which it makes a charge on the books of \$3 per log car against the lumber company.

The Riverside & Gulf connects with the Santa Fe at a point known as Milvid junction and extends southward for a distance of about 12 miles. It has an additional 8 or 10 miles of logging spurs, passing tracks, and sidings. Its rolling stock consists of 3 locomotives, a log skidder, and some 70 other cars, not equipped with safety appliances; and it has 1 station agent, 6 train crews, and a number of shop and trackmen. It has received no divisions since August, 1908; previous to that time it was allowed 2 cents per 100 pounds by the Santa Fe.

The mill of the controlling interests is on the tap line about a mile south of the junction with the Santa Fe. The logs are hauled in by the tap line from the logging spurs in the timber at a charge of \$3 per loaded car. The tap line switches the lumber from the mill to the Santa Fe, for which it makes a charge on its books, in order that it may be credited with proper earnings, of 2 cents per 100 pounds, but no such collection is made from the lumber company.

There is also an independent hardwood mill served by the tap line, located about one-half mile south of the yellow-pine mill of the controlling interests and owned and operated by T. B. Allen &

Company. Its plant is said to be worth \$175,000, and it has logging spurs extending from a connection with the tap line for several miles into its timber. The Allen Company has railroad equipment by means of which it hauls logs over its logging spurs to the tap line, over which it has a trackage right to the mill. For this privilege it pays the tap line 90 cents per loaded car. It will be seen, therefore, that the Riverside & Gulf does not haul logs to the Allen mill. In its statement of traffic and revenues, however, it includes the weight of the logs thus hauled by the Allen Lumber Company itself, and shows the earnings under the 90-cent trackage charge referred to as freight earnings. The lumber of the Allen mill amounted to about 6,000 tons for the year covered by the record; it is moved by the tap line from the mill to the Santa Fe, and for this service a charge of 2 cents per 100 pounds is made on the books. But this charge is not being collected. The explanation is that when the Allen Company located its mill on the tap line some years ago the president of the Miller-Vidor Company guaranteed that it would have the same rates to the markets as mills located on the Santa Fe proper. At that time the tap line had joint rates with the Santa Fe and was receiving an allowance of 2 cents. It is explained that if as the result of this proceeding the joint rates are restored and divisions are again received from the Santa Fe the tap line will collect the 2-cent charge on traffic of the Allen Company from the Santa Fe; but if this proceeding has another result the charge of 2 cents on the lumber of the Allen mill will be paid by the Miller-Vidor Lumber Company, under the obligation imposed upon it by the contract under which the Allen Company was induced to locate there.

The traffic of the Riverside & Gulf for the year 1910 consisted of 26,565 tons of lumber and 131,880 tons of logs, handled for the Miller-Vidor Company; 6,214 tons of hardwood lumber for T. B. Allen & Company, and about 1,500 tons of other freight, practically all of which was handled for the account of the Miller-Vidor Company.

JEFFERSON & NORTHWESTERN RAILWAY.

The Jefferson & Northwestern Railway Company was incorporated in 1899, and its capital stock, amounting to \$20,000, is owned by the stockholders of the Clark & Boyce Lumber Company, which also holds its notes in the sum of \$60,000. The tap line was built by Clark & Boyce as long ago as 1892 for the purpose of bringing logs to the mill, which is at a point known as North Jefferson, Tex., less than a quarter of a mile from the line of the Texas & Pacific and about a mile from the line of the Missouri, Kansas & Texas. The tap line

has about 32 miles of track connecting with these railroads and serving the mill and timber. There are also two or three small mills along the line that formerly manufactured lumber, but none of them had been in operation for two or three years prior to the hearing.

The logs are hauled to the mill of the lumber company by the tap line for a distance of 32 miles. Some logs also are brought in by the tap line from spur tracks connecting with the Missouri, Kansas & Texas, over which the tap line enjoys trackage rights for that purpose. On all log movements the lumber company is charged \$5 per car, and on log movements of the latter character \$2 of the charge goes to the Missouri, Kansas & Texas for the trackage privilege. The manufactured product is switched by the tap line to one or the other of the trunk lines, a distance of a quarter of a mile or 1 mile, as the case may be. It receives no allowances from the Texas & Pacific, but receives from the Missouri, Kansas & Texas a division on lumber of from 2 cents to 5 cents per 100 pounds, the average allowance on each carload of lumber moving over that route being about \$22.

The tap line has no passenger traffic; and no logs or lumber were handled for others than the controlling lumber company, the traffic of which for the year 1910 amounted to 26,950 tons of logs and 10,200 tons of lumber. There was, however, a substantial movement of crossties for a firm of railway contractors at a charge of \$10 per car for a haul of 18 miles. It is said that 81 per cent of the total tonnage and 82 per cent of the revenue for the year 1910 came from the traffic of the proprietary lumber company.

It was not until 1911 that the tap line filed its first report with the Commission.

BEAUMONT & SARATOGA.

At the time of the hearing the Beaumont & Saratoga Transportation Company was receiving no allowances from the trunk lines, the division of from 1 to 3 cents per 100 pounds which it had formerly secured from the Texas & New Orleans having been cut off. It was incorporated in 1906, under the Texas laws, not as a railroad common carrier, but as a transportation company. Its entire capital stock, amounting to \$20,000, is held in trust for the Keith Lumber Company, which also holds notes of the tap line for about \$100,000.

The track of the tap line is 12 miles in length and extends from a connection with the Santa Fe and with the Texas & New Orleans at Voth, Tex., in a westerly direction to Pelt. Its equipment consists of four locomotives and seven flat cars. The lumber company uses two of the locomotives in operating the logging tracks which connect with the incorporated tap line at various points, and the steel in which is leased from the tap line for a consideration of \$100 per month that covers also the use of the locomotives. The tap line

hauls the logs from the junction of the 4 unincorporated spurs with its tracks to the mill, at a charge of \$3 per car. A considerable portion of the output of the mill moves out by water in boats or barges owned by the lumber company. The lumber that is shipped by rail is frequently taken by the trunk lines directly from the mill, but the tap line sometimes switches the cars.

There is a small movement of traffic for others than the lumber company, the revenue from which amounted during the year 1911 to \$257.59. The report for that year was the first that was filed with the Commission.

ANGELINA & NECHES RIVER RAILROAD.

The Angelina & Neches River Railroad was originally built by the Angelina County Lumber Company as an unincorporated logging road, extending from a connection with the Cotton Belt at Keltys, Tex., into the timber. It was incorporated in August, 1900, and capital stock amounting to \$55,000 was distributed among the stockholders of the lumber company. The two companies have the same officers. The mill is at the junction with the Cotton Belt. The track of the tap line as described of record now extends to Prosser, where it connects with the Houston East & West Texas Railroad and thence easterly to Naclina, making about 20 miles in all. The tap line has one locomotive, a passenger car, and three box cars. It formerly owned logging cars and three additional locomotives, which were transferred to the lumber company to escape the operation of the state safety appliance acts. The lumber company also has about 15 miles of unincorporated track running from the terminus of the incorporated line at Naclina into the timber.

The traffic consists almost entirely of the lumber of the Angelina County Lumber Company; there are no other sawmills served by the line. A passenger service was inaugurated in November, 1910, but the traffic is light. The lumber company hauls the logs from the point where they are loaded to the mill, paying the tap line for the privilege of operating its trains over the incorporated track, a charge of 50 cents per thousand feet, log scale, which is equivalent to about $1\frac{1}{2}$ cents per 100 pounds on the weight of the logs. Shipments of rough lumber are switched by the tap line from the sawmill to the Cotton Belt tracks, a distance of a few hundred feet, but the Cotton Belt itself moves shipments of dressed lumber directly from the planing mill. Traffic delivered to the Houston East & West Texas is moved by the tap line for a distance of 3 miles from the mill to Prosser. The tap line receives a division of from 1 to 4 cents per 100 pounds from the Houston East & West Texas, and from 2 to 4 cents per 100 pounds from the Cotton Belt.

SUPPLEMENTAL REPORT.

In the near future, in a supplemental report, we shall state the facts in relation to all the other tap lines whose affairs are disclosed on the record before us, and shall point out which of them are regarded by the Commission as common carriers in the service that they render to their respective proprietary companies. The cancellations by the trunk lines will be allowed to become effective on May 1 as provided in the tariffs now on file. The rights of such tap lines as we find, in the supplemental report, to be common carriers will be protected in the order that will be entered herein in connection with the supplemental report.

PROUTY, *Chairman*, concurring:

While I do not dissent from the conclusions finally announced in the majority opinion, I do dissent from the implication that the building of branch-line railroads, whether denominated tap lines, industrial lines or what not, by those persons who own an industry to be served by these railroads, should be discouraged by this Commission. While the industrial line and the tap line have been the medium through which the grossest discriminations have been perpetrated in the past my belief is that these unlawful practices can be stopped without the slightest difficulty and that the thing itself should be encouraged rather than discouraged. This view, which I have entertained from the first, is confirmed by observation and reflection, and I desire to keep it clearly before the public.

My meaning can be best illustrated by the accompanying rough diagram.

Let us assume that AB is a 100-mile section of a trunk-line railroad and that CD is a branch extending from C to D. The section traversed by this railroad produces lumber, coal, stone, perhaps various commodities. The principle is the same in all cases, although the application might somewhat differ.

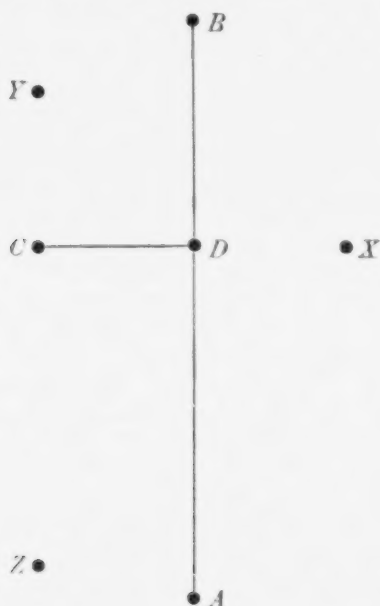
X, Y, and Z are localities distant from the main line by about the same number of miles as C, but in these localities the industry has not been developed.

The railroad AB applies to all points upon its main line and to its branch line CD the same rate to markets of consumption. X, Y, and Z can not be developed until railroads are constructed, connecting these localities with the main line. Manifestly it is for the public interest that connecting lines shall be constructed, since otherwise a monopoly in the production of the commodity at points tributary to AB is possible. By whom shall these branch railroads be built?

Manifestly the owners of property at X may construct a road from X to AB and may transport the commodity manufactured from X to AB and there ship it to destination. The cost of render-

ing this service may be, if lumber, 3 cents per 100 pounds; if coal, 10 cents per ton. Whatever the cost, it is plain that the operator at *X* is at a disadvantage as compared with the operator at *C* by the exact amount of this charge, and it frequently and perhaps usually happens that the advantage thereby obtained by the industry at *C* is sufficient to entirely prevent, certainly for a long time, the development at *X*, *Y*, or *Z*.

The inevitable conclusion is that the railroad *AB* absolutely dictates the development of this region. If it elects to construct its branch line to *C*, that locality becomes valuable, whereas if it goes to *X* or to *Y* those are the favored locations. It must be admitted



that it is most unfortunate to put the development of a country into the hands of a main-line railroad as this of necessity does. My own belief is that those persons interested in the localities other than *C* should be permitted, where circumstances justify, to construct a railroad from *X* to the main line; that the main line *AB* should be required to establish in connection with the branch line from *X* the same rate which it applies from its branch line at *C*, and should be required to accord to the branch line in the way of a division a sum which is fairly equivalent to the expense which it incurs in originating this traffic at *C* and handling it from *C* to *D*. This is certainly in the public interest; what valid objection can be urged against it?

Consider this, first, from the standpoint of the main-line railroad. That road transports the traffic from C to D at a certain cost and from D to destination at a certain other cost. If from the through rate there be deducted the cost of transporting the business from C to D, there remains the service from the main-line point D to destination. If, now, it allows the other branch line from X the same amount, it becomes a matter of indifference, so far as its profit as a railroad is concerned, whether traffic originates upon its own branch line at C or upon the independent branch line at X.

This might be urged, possibly, that if the mine or the forest at X is developed the mine or the forest at C may produce less, and the main line may therefore have less business for its own branch; but this is a matter of small consequence, which ought not to weigh in the general conclusion. Its profit is not made upon the branch line but upon the main line.

If this railroad AB itself owns lands at C which it desires to develop, then manifestly it is for its advantage that the branch line from X should not be constructed; or, if those persons interested in the main line and potential in the direction of its policy own lands at C, it is manifestly for their interest that no other similar industry should be developed; but the function of a railroad in these modern days has come to be, not the exploitation of its private property used in other than its transportation purposes nor in the enriching of those who sit in its directorate, but rather in serving the entire public impartially and for a reasonable consideration.

From the standpoint of the main-line railroad, considered purely as a railroad, there is no reason why the branch line from X should not be permitted to connect and should not be allowed a suitable division. It should be carefully noted that this only applies in its entirety to instances where the main line establishes a blanket rate upon its main line, as is usually done with producing points in case of lumber, coal, etc., and where it extends that rate to its own branch lines. If a fair mileage scale were applied, both to main line and to branch line, these difficulties would largely disappear. My proposition only goes to this: That the main-line road should be required to put the industry at the end of the independent branch line upon substantially the same basis that it puts the industry at the end of its own branch line or at a corresponding point upon its main line.

Consider this matter, now, from the standpoint of the mine or the mill. Compare the operator at C with his competitor at X.

The distance from the main line to C is the same as from the main line to X. There is no reason why the rate from X ought not to be the same as the rate from C. Suppose the same rate is applied and is paid by both these competing operators. Looking to the mill and

to the company which owns and operates the mill, manifestly there is no discrimination.

But it is said that the same individuals who own the industry at X also own the capital stock of the railroad which leads from X to the main line, and that therefore they have finally the benefit of whatever division is allowed to this independent branch line.

This branch line is performing a legitimate common-carrier service, exactly the same service from X which is performed from C. The agency which performs that service from X is entitled to a fair compensation to exactly the same extent as is the agency which performs that service from C.

If, now, the expense of constructing and operating the railroad from X to D is such as to leave no net return out of the divisions allowed by the main line, then the individuals who own the mine at X have received nothing beyond that received by those who own the mine at C, although they have invested and devoted to the public service an additional amount of capital. If the net is sufficient to pay a fair return upon the fair value of the property, they have received exactly that to which they are entitled under the constitution of the United States.

The mining company is not discriminated in favor of, for it pays the same rate as does the competitor at C. The individuals who own the railroad from X to the main line are not discriminated in favor of as against the individuals who own the mine at C, for they have only received a legitimate return upon the property which they have devoted to this public service, if it be a legitimate public service. It is true that if the division allowed to the independent branch line is excessive, that does work out a final discrimination, not in favor of the mine at X, but in favor of the individuals who own the railroad and who also own that mine. The discrimination would be exactly the same if the divisions were, with respect to traffic, not produced at the mine, but handled from the mine of a competitor upon the branch, or with respect to an entirely different species of traffic.

It is urged that this gives to the owner of property at X an advantage over the owner of similar property at Y, and this is true, for neither X nor Y can be developed without a railroad. But that sort of discrimination arises out of the fact that the operator at X has the money or the means of securing the money with which to build the railroad from X to the main line, while the owner at Y does not possess this means. Some day the importance of this aspect of the case may become such that the government itself will build and operate all these branches, but until then the most that can be done is to secure to all persons equality of opportunity, to give to the individual at Y, if he can find the money, the same chance which the individual at X possesses.

In my opinion, this right to build branch lines and obtain recognition from the main line is becoming daily of more and more consequence. Our trunk lines have been built; many, perhaps most, of the branch lines remain to be built. Upon what inducement is this future development to take place?

In the past branch lines have been often constructed to develop properties which the railroad itself owned; still more frequently to develop properties owned by those who could influence the policy of the main-line railroad.

Branch lines have often been constructed as stockjobbing propositions with a view to selling them at an extravagant price to the main line. These motives will not to any great extent operate in the future, and if there is to be a free development of our resources, if that development is not to be put entirely under the control of our railroads and the influences which dominate them, then the recognition of branch lines by the main line must be enforced.

It is significant that the three states in which the tap lines under consideration are most developed—Texas, Louisiana, and Arkansas—in every instance approve and insist upon the legal status of these railroads, the reason being, as stated by their accredited representatives before this Commission, that the recognition of the tap line promotes the development of the country by fostering the building of railroads which will otherwise not be constructed and which the country absolutely needs.

It is desirable that common carriers by rail should be strictly confined to their public functions and not permitted to engage in private commercial pursuits. While this may not be as imperative in case of branch lines as with trunk lines, since the former can be subjected to a closer scrutiny and a higher degree of control, still the ideal condition would be one in which the carrier's service was performed either by the government or by some private corporation with no interest whatever in the property transported. We should not, however, sacrifice the essential to the pursuit of the ideal, nor should we repress legitimate undertaking simply because some phases of the means employed may result in abuse. Congress might prohibit all connection between railway and private industry. As to what has actually been done, it may be observed:

First. When Congress came to declare its will in this respect by the enactment of the commodities clause, lumber was expressly excepted from the operation of that provision, thereby giving an implied sanction to unity of ownership between the lumber-carrying railroad and the commodity which is carried.

Second. The commodities clause itself as interpreted by the Supreme Court and as accepted by Congress since that interpretation

does not prohibit a common ownership of industry and railroad, provided the two are kept entirely separate and distinct in their operation. Inasmuch as the statute has not been changed since that interpretation was put upon it, it must be assumed that as so interpreted it represents the legislative will.

The abuses disclosed by the present proceeding result mainly from two causes:

(a) In many cases divisions are allowed on account of so-called railroads which are in reality mere plant facilities. Of the 83 cases now before the Commission, a majority are of that character.

I do not attempt to define here a railroad. I do wish to say, however, that the basic inquiry is not, in my opinion, whether the operation is great or small, but rather is it honest. Does it occupy the sphere of a railroad?

If public necessity requires that this railroad be built and operated; if, under the laws of the state in which it exists, land can be taken *in invitum* for its right of way; and if the railroad itself is, in fact, operated and maintained as a public carrier in conformity to the laws of the state which creates it, and of the United States in so far as it is subject to federal regulation, then I think it must be treated as a public servant, irrespective of the amount or the character of its traffic.

If a particular railroad is found to be a common carrier by railroad, under the act to regulate commerce, then I think, irrespective of its stock ownership, without reference to the purpose of its creation, it must be treated as such; that in all cases the trunk line may establish joint rates and allow proper divisions of those rates and, in many cases, it should be compelled to do so.

(b) In many instances where the allowance of a division is proper the division itself has been excessive, and this, without doubt, has inured to the benefit of the industry or of the persons or individuals who owned the industry. While there may be some doubt as to our authority in the premises, I believe we have the right to determine in these cases whether the divisions are excessive and to order them reduced to a proper amount.

If this Commission prohibits the payment of any division in all cases where the railroad is not a bona fide common carrier, and confines those divisions when properly allowable within proper limits, I am unable to see how harmful discrimination can result.

One fact has been developed which does lead to slight discrimination and which we can not apparently correct, and that is the issuing of passes to the officers of these common-carrier tap lines who are also owners and frequently officers engaged in the management of the industries. The use of these passes when traveling upon the

business of the industry undoubtedly gives to that industry an advantage over its competitor.

This is wrong and should be corrected—if not by the voluntary action of the carriers who issue and honor these exchange passes, then by Congress. But let it be noted that this vice is not confined to the insignificant tap line. Directors of main-line railroads are almost invariably engaged in private business, in the course of which free transportation is used.

Discrimination of this kind ought not to exist, but it will continue to exist until common carriers by rail are prohibited from issuing these exchange passes. When the issuing of free transportation by railroad is restricted to railroad employees who spend substantially their entire time in railroad service, with such general exceptions as may be made upon sentimental grounds and which involve no element of commerce, discrimination from this source will cease, and not until then.

I do not wish at this time to enter upon any general discussion of this tap-line question; that I have done in previous reports; but only to restate my conviction that to prohibit or discourage legitimate enterprises of this character is to deal a serious blow to the future development of this country.

I may add that I do not fully concur in the suggestion that main-line carriers may make to the owners of private railroads not common carriers allowances for the movement of lumber from the mill to the main line. I doubt whether this is a transportation service within the meaning of the fifteenth section; but even if the allowance might be under some circumstances lawful, we ought not to invite it.

There is no essential difference between a private railroad operated by steam and a tramway or a dray. When once the door is opened there is no stopping place. I believe that all these services should be performed by the railroad itself and that the shipper, instead of receiving an allowance for these accessorial services, should be compelled to pay a reasonable charge for every service rendered outside the ordinary transportation.

INVESTIGATION AND SUSPENSION DOCKET No. 11.

THE TAP-LINE CASE.

Decided May 14, 1912.

Following the original report herein, *ante*, page 277, the remaining tap lines shown of record are considered and conclusions announced. Comments are also made respecting certain irregularities and defects in practices and tariffs.

SUPPLEMENTAL REPORT OF THE COMMISSION.

BY THE COMMISSION:

In the original report herein (*ante*, page 277), after stating the history of the several tap lines there mentioned and setting forth the salient features in connection with their ownership, physical condition, general character, source of traffic and revenue, and the manner in which their operations for the proprietary company are conducted, we found that in none of the cases there disposed of did the tap line perform a service of transportation either in the movement of the products of the mill of the proprietary company or in the movement of its logs from the forest to its mill. We held that the service in each case, so far as the logs and lumber of the proprietary company are concerned, was a plant service. It was also said at the close of the report that in a supplemental opinion, to be announced in the near future, we would state the facts in relation to all the other tap lines whose affairs are disclosed in the record before us, pointing out from among them such as in the judgment of the Commission bear a different relation to their respective proprietary lumber companies; and that in connection with the supplemental report we would enter such order with respect to all the tap lines before us as the conclusions announced might require.

Many of the tap lines described in this report differ only in detail from the lines described in the original report and consequently are controlled by the same principles. At the conclusion of the statement in each case we have noted a finding to which effect will be given in the order to be entered. It seems well, however, before describing the remaining tap lines of record, to call attention to a practice that finds frequent illustration in the pages that follow.

In a number of cases the tap line without charge hauls the logs of the lumber company that owns it. In other cases the lumber company itself hauls its logs over the tap-line rails to its mill. In some instances its right to do this is evidenced by a formal trackage contract; in other instances it is done under a verbal understanding. In some cases no charge is entered up by the tap line against the lumber company for this use of its tracks, and in a few cases the lumber company pays a small compensation. In several instances the trunk lines themselves have given trackage rights for a small toll to lumber companies. We have not understood that special privileges of this kind may lawfully be granted to a shipper. It is not uncommon for one railroad to give the use of its rails to another railroad under a trackage agreement, but we see no way in which a shipper may enjoy such a privilege over the rails of a common carrier, particularly when the compensation for the privilege is not published and the privilege is not open equally to other shippers. Except in one or two cases where the tap line crosses the state boundary line such arrangements are possibly to be regarded as purely local and therefore beyond our control. But they are inherently unlawful, and afford strong evidence that a tap line whose rails are used in that manner by its proprietary lumber company is a mere plant facility. On the other hand, such an arrangement with a shipper, even though it be purely local and therefore beyond our control, may nevertheless operate as a rebate and be punishable as such under this law when it appears that the concession is made in order to secure the interstate traffic of the shipper. All such arrangements are wrongful and we shall expect them to be discontinued. It may be well again to say that in the disposition made of these cases we have had in mind the special conditions that exist in this territory and have taken such action as under all the circumstances developed seemed necessary in the prevention of unlawful discriminations and preferences. Doubtless the same or generally similar conditions exist in other extensive lumber-producing districts and may be duplicated elsewhere in connection with different classes of traffic. But it is obvious that matters of this nature can not be dealt with in a wholesale manner, but must be considered separately and in the light of the surrounding conditions and special facts. It will, therefore, be fully understood that all that is here said is intended to relate specifically to the conditions found to exist in this territory.

MISSOURI & LOUISIANA RAILROAD.

The entire capital stock of the Missouri & Louisiana Railroad Company, amounting to \$150,000, is held by trustees for the Central Coal

& Coke Company; and the two companies have the same officers. The tap line is composed of four separate properties, one in the state of Missouri and one in Arkansas, are operated as facilities of the coal mines of the proprietary company. Inasmuch as the record relates only to lumbering conditions, we shall confine our discussion of this tap line to the other two so-called divisions, which are situated in the state of Louisiana and are used as facilities in the lumbering operations of the proprietary company.

The track known as the Carson division connects with the Kansas City Southern at Carson, where the Central Coal & Coke Company, which we shall hereinafter refer to as the lumber company, has a mill. From that point it extends westward and northward for about 7 miles to a connection with the Santa Fe at Pujoe. The line also extends eastward from Carson for about 3 miles to a connection with the Lake Charles & Northern. There is also a 4-mile branch extending from the main track to a connection with the Santa Fe at Hall City. The aggregate length of the tracks composing what is known as the Carson division is about 14 miles. They are not owned by the tap line, but are operated by it under a verbal arrangement with the Central Coal & Coke Company, which constructed the tracks and has retained title to the right of way. The tap line owns two locomotives, but no other equipment. The logging cars belong to the lumber company, which also owns one locomotive and uses one of the locomotives that is owned by the tap line. The switching of the logging cars in the woods is done by the lumber company, using the two locomotives already referred to, but the logs are hauled from the assembling track to the mill by the tap line, which enters up a charge for that service of \$3 per car against the lumber company. The tap line switches the carloads of lumber from the mill for a distance of less than 2,000 feet to the Kansas City Southern, or moves them nearly 4 miles to the Lake Charles & Northern, or 7 miles to the Santa Fe. The bulk of the traffic actually moves out over the Kansas City Southern, which makes an allowance out of the published rates of from a fraction of a cent to 3 cents per 100 pounds. Practically the same divisions are paid by the Lake Charles & Northern, but no allowances are accorded by the Santa Fe. The traffic on the Carson division for the year 1910 aggregated 269,991 tons, on which the allowances received from the trunk lines aggregated \$14,390.10, while the charge entered up against the lumber company for the log haul amounted to \$29,319. Apparently the logging trains are run on an irregular schedule. If there is any outside traffic it is insignificant, and the record does not indicate that any fares are collected from such passengers as may be carried on the engine.

The tap line in its relation to the proprietary lumber company and the traffic of this mill is purely a plant facility. For the movement of the lumber from the mill to the Kansas City Southern, if performed under the conditions referred to in our original report, the lumber company may receive nothing beyond a reasonable allowance under section 15.

The so-called Neame division connects with the Kansas City Southern at Neame, La., and runs westward for a distance of 5 miles to Rand. It is owned by the Central Coal & Coke Company, but is operated by the Missouri & Louisiana Railroad under a verbal arrangement. The lumber company itself operates several miles of logging spurs, moving the logs to the connection with the main stem from which they are taken to the mill at Neame by the tap line. Here again a charge of \$3 per car is made against the lumber company for the log movement. The mill, however, is on the tracks of the Kansas City Southern, which spots the empty cars and removes them when loaded. An allowance of from a fraction of a cent to 3 cents per 100 pounds is made out of the published rates. The tap line owns two locomotives, one of which is used by the lumber company on the spurs, in addition to a locomotive which the lumber company itself owns. The only cars in service are logging cars, which are owned by the lumber company. The traffic on this section for the year 1910 aggregated 185,142 tons, on which the Kansas City Southern paid allowances amounting to \$16,174.82, while the lumber company, for the hauling of the logs to the mill, was charged \$17,148. There is no other mill or industry served by this track, and the record does not indicate the movement of any freight on which the proprietary company was not directly interested.

It is clear that this part of the tap line is purely a plant facility, and the allowances heretofore made by the Kansas City Southern have operated as a fraud upon the law. No allowances may be made in the future either to the lumber company or the tap line.

SAGINAW & OUACHITA RIVER RAILROAD.

The mill of the Saginaw Lumber Company is on the east bank of the Ouachita River, about two and one-half miles from the line of the Iron Mountain system, which it reaches with its manufactured lumber by means of its incorporated tap line, known as the Saginaw & Ouachita River Railroad Company. The line was constructed some 15 years ago, but was not separately incorporated until 1905, when capital stock of the railroad corporation to the amount of \$25,000 was issued to the lumber company in exchange for the railroad property. They constitute one general investment. Near the mill is a town known as Saginaw, with about 250 inhabitants, being largely the employees of the lumber company and their families. The only

store is one conducted by the lumber company. There are a few farms so close to the Iron Mountain that they usually haul their products to that system for transportation. The only industry other than the Saginaw Lumber Company that is served by the tap line is a small mill near Saginaw, which manufactures furniture stock. It will therefore be seen that it has very little traffic in which the lumber company has not a direct interest; the record, in fact, shows that approximately 99 per cent of it is furnished by the lumber company. While it carries passengers, the revenues from that source during the fiscal year 1910 were but \$329.85, or less than \$1 a day. The larger part of this small revenue, we can not doubt, was paid by employees of the lumber company.

The lumber company has an unincorporated logging road which extends from a point on the west bank of the river, opposite the mill, for a distance of about 12 miles into the timber. The logs are brought over this road to the river and floated across to the mill. For the movement of the lumber from the mill to the Iron Mountain, a distance of $2\frac{1}{2}$ miles, the tap line receives an allowance of 3 and 4 cents per 100 pounds out of the joint rates, which are the same from the mill at Saginaw as from the Iron Mountain junction point. The claim is that this division is not intended to and does not in fact cover the movement of the logs into the mill.

The road is apparently operated at a substantial profit, the operating revenues for the year 1910 being \$7,915.47, with operating expenses aggregating but \$5,726.21. In the year 1910 it declared a dividend of \$6,282.32, partly out of surplus.

The equipment consists of one locomotive and a caboose, which is used for passengers, l. c. l. freight, and the mail. The necessary cars for shipments of lumber are furnished by the Iron Mountain. There are no station facilities. The employees consist of one train crew and two or three trackmen. The officers of the lumber company are officers also of the tap line and receive and use interstate passes. The clerks of the lumber company act as clerks for the tap line and the tap line credits the lumber company for their services.

Under the ruling in the original report in this proceeding the lumber rate extends from the mill and the Iron Mountain, upon arranging with the lumber company to perform the service for it, would be entitled to make it a reasonable allowance under section 15. We find on the facts disclosed that the tap line comes within the category of cases outlined in the original report.

SALINE RIVER RAILWAY.

The Saline River Railway Company was incorporated in 1897 and is controlled by the stockholders of the Saline River Lumber 23 L. C. C.

Company, to which it is indebted in a sum exceeding \$125,000, principally for money expended in changing the route and widening the track from narrow to standard gauge. The two companies are therefore identical in interest and have been from their inception; the property as an entirety was acquired by the present owners in 1907.

The Saline River Railway connects with the Cotton Belt at Draughon, Ark., where the sawmill and planing mill of the lumber company are situated, and extends southward to a point known as Glynn, Ark., where a connection is made with the tracks of the Warren & Ouachita Valley Railway, another tap line of which further mention will be made hereafter, by means of which it reaches the Rock Island. (See map, *post*, p. 556.) The tap line consists of about 19 miles of main track and less than 2 miles of sidings, with trackage rights over the Warren & Ouachita Valley to certain unincorporated logging spurs owned and operated for the Saline River Lumber Company. The equipment of the tap line consists of 3 locomotives, 1 combination passenger car, 35 logging cars, and 3 other cars. It has a small station building at New Edinburg, which is described of record as the only town on the line with the exception of Draughon. It has some stores and a bank, but is not shown as a community on the census reports of 1910. We understand, however, that there are about 200 inhabitants in the locality. It is about 9 miles from Draughon, and, until shortly before the hearing, was the terminus of the incorporated tap line. The country traversed by the tap line is largely cut over timber lands, with a few farms and one or two small portable sawmills.

The sawmill and planing mill of the lumber company at Draughon is served by a sidetrack owned jointly by the tap line and the trunk line. The Cotton Belt places the empty cars and switches the loaded cars of lumber from the mills. The tap line, on the other hand, hauls the logs from the loading point on the logging spurs in the woods direct to the mill, making a charge of \$3 per car against the lumber company for the service on the unincorporated tracks. For the service of hauling the logs over the incorporated track the tap line receives from the trunk line a division of from 1 to 2½ cents per 100 pounds. About one-half of the lumber produced at the Draughon mill, however, is hauled by the tap line to Glynn, and thence by the Warren & Ouachita Valley to Banks, where it is received by the Rock Island, which allows a division of 5 cents per 100 pounds, of which 1½ cents is retained by the Warren & Ouachita Valley. The Rock Island makes the same rate as that published by the Cotton Belt, 3½ cents going to the

Saline River Railway Company. There is no other explanation of record for this back-haul movement of the lumber.

The Saline River Railway has two regular logging trains daily between Draughon and New Edinburg, on which it transports passengers and carries the mail. Its revenues from passenger traffic for the year 1910, however, were but \$1,041. Its freight revenue for the same period was \$20,019.19. A few carloads of staves and other forest products were handled for outside parties, and the total traffic in commodities other than forest products was 1,400 tons, of which 191 tons was outbound farm products and the remainder inbound shipments of supplies, merchandise, and material.

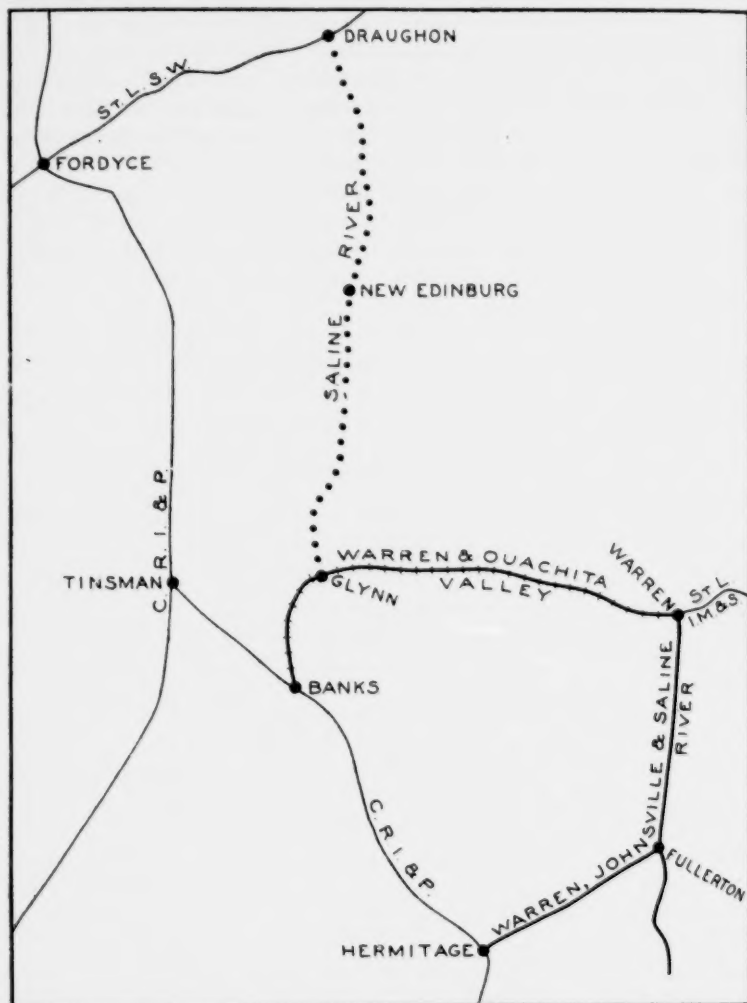
This is a typical case of a mill located immediately on one trunk line, but which is induced to back haul its lumber for a considerable distance to another trunk line in order to get the benefit of its higher allowances. The Cotton Belt extends its lumber rate to the mill and performs the service. There is no reason, therefore, why it should make an allowance to this tap line. The aggregate division out of the rate to the two tap lines for handling the lumber from the mill through Glynn and thence over the Warren & Ouachita to Banks may not lawfully exceed 2 cents per 100 pounds.

WARREN & OUACHITA VALLEY RAILWAY.

The Warren & Ouachita Valley Railway Company was incorporated in 1899 and has capital stock outstanding to the amount of \$284,000. It is owned by the stockholders of the Arkansas Lumber Company and the Southern Lumber Company, both of which have mills on its line. There is no bonded or other indebtedness. The officers of the tap line are officers also of one or the other of the lumber companies. The record does not indicate whether there is any intercorporate or other relation between the lumber companies.

The tap line connects with the Iron Mountain at Warren, Arkansas, and extends westward for a distance of about 16 miles to Banks, Arkansas, where it meets the rails of the Rock Island. At Glynn, about 5 miles from Banks, a connection is made with the line of the Saline River Railway Company, as heretofore stated. The lumber companies jointly own an unincorporated logging road extending from a connection with the tap line for a distance of 10 or 12 miles into the timber. Each of the lumber companies also has private logging spurs connecting with the rails of the Rock Island. These unincorporated spur tracks are operated by the lumber companies themselves. In hauling their logs to the mills they have trackage rights over the line of the Rock Island for which they pay 75 cents per train-mile; they pay the tap line 15 cents per 1,000 feet of logs,

which is equivalent to about 50 or 60 cents per train-mile, for the privilege of operating log trains over the rails of the tap line to the mills from the junction with the Rock Island or from the junction of the unincorporated spurs with the tap line, as the case may be.



One of the mills is at a distance of $1\frac{1}{2}$ miles and the other 2 miles from the connection with the Iron Mountain at Warren; they are therefore nearly 15 miles from the junction with the Rock Island. The tap line hauls the lumber from the mills to the Rock Island, on the

one hand, and switches the lumber to the Iron Mountain on the other, the tonnage being about equally divided between the two trunk lines. Out of the joint rates on lumber which are the same from points on the tap line as from stations on the trunk lines in this vicinity, an allowance is made of from 1 to 5 cents per 100 pounds.

The Warren & Ouachita Valley has three locomotives, two passenger coaches, six freight cars, and a caboose. Each of the lumber companies also owns and operates locomotives and logging cars. The tracks of the tap line are laid with 60-pound steel rails and are well ballasted, with permanent bridges. It has a station building at Warren and a telegraph and telephone system. It operates two trains daily each way and its revenue from passengers is said to exceed \$1,000 per month. While more than 5,000 bales of cotton are raised along its line annually, most of this traffic is drayed by the farmers to the trunk lines. The total lumber tonnage for the fiscal year 1910 was 53,830 tons, of which about 7,500 tons was moved for small independent mills on or near its line. More than 90 per cent of its entire traffic and revenue is supplied by the lumber companies in whose interest it is operated. In this percentage is not included the log movement over the tap line performed by the lumber companies themselves. Including this large tonnage the percentage of outside traffic would be comparatively insignificant. In the outside traffic is included the lumber received from the Saline River Railway, amounting to something like 20 carloads per month.

The record indicates that the Warren & Ouachita Valley is a profitable investment, and this is confirmed by the annual reports made to the Commission. Its total revenue for the fiscal year 1910 was \$83,496.09, and its net operating revenue \$21,140.35. It paid during that year a dividend of \$28,400, partly out of surplus, leaving a surplus at the end of the year of \$3,502.93, having paid during the previous three years dividends aggregating 50 per cent on its capital of \$284,000.

In this case the controlling lumber companies not only have trackage rights for hauling their own logs over their own tap line to their mills, but have trackage rights for the same purpose over the Rock Island. This we regard as unlawful. We do not understand that shippers may move their property over the rails of common carriers except under lawfully published tariff provisions open to all shippers. As a part of the contract giving its use in that manner to the lumber companies the Rock Island requires them to route half of the products of their mills to its line. The arrangement apparently was a concession to the lumber companies for their traffic.

The mills of the controlling companies at Warren are respectively 1 and $1\frac{1}{2}$ miles from the Iron Mountain rails. We think that the

Iron Mountain may pay this tap line nothing in excess of a reasonable switching rate, which we fix at \$2.50 per car, and that the Rock Island may make a division out of the rate from these mills not exceeding 2 cents per 100 pounds.

WARREN, JOHNSTOWN & SALINE RIVER RAILROAD.

The entire stock of the Warren, Johnstown & Saline River Railroad Company, of which \$50,000 has been issued, is owned by the stockholders of the Bradley Lumber Company, a subsidiary corporation of the Chicago Lumber & Coal Company. Its outstanding bonds to the amount of \$200,000 also are apparently held by the lumber company or its stockholders.

The tap line connects with the Iron Mountain at Warren, Ark., and with the Rock Island at Hermitage, the main track being about 15 miles in length. The statement on the record is that it has 1.13 miles of yard tracks and sidings, but the annual report to the Commission for the fiscal year 1910 shows over 10 miles of branch lines and spurs. The latter figure doubtless includes the tracks aggregating some 5 miles in length that are described on the record as private logging spurs owned by the lumber company. The equipment of the tap line consists of 3 locomotives, 1 caboose, and 50 logging cars. A time table is published which shows one "mixed train" moving daily on regular schedule; but it is explained that this schedule was issued in compliance with the regulations of the Arkansas commission, and that in fact there is no regular train movement. A few passengers are carried in the caboose without any charge. The tap line has three train crews and two gangs of trackmen, one of which is employed in maintaining the logging spurs.

The mill of the lumber company is at the junction with the Iron Mountain in Warren. In 1902 six miles of logging track were built by the lumber company from the mill into the timber, and subsequently an additional 4 miles were laid. When the tap line was incorporated, in 1905, the track then in operation was turned over to it, and an additional 4 miles were built to the connection with the Rock Island. A contract, to which the proprietary lumber company was a party, was entered into providing for the payment of allowances by the Rock Island to the tap line, and the delivery to the Rock Island of not less than 50 per cent of the output of the mill. The divisions thus received range from $1\frac{1}{2}$ to 5 cents per 100 pounds, the maximum amount being paid on the major portion of the traffic. Apparently the same allowances are made by the Iron Mountain, which actually receives nearly one-half the traffic. There are also some joint class and commodity rates published in connection with the Rock Island to interstate points.

The tap line hauls the logs from the point where they are loaded on the cars to the mill, charging the lumber company \$6 per car in addition to the actual expense of maintaining and operating the logging spurs heretofore referred to. Apparently there is no arrangement by which this charge or part of it is subsequently refunded or written off the books by the tap line, but the record is not entirely clear in this regard. The empty and loaded cars for the shipments of manufactured lumber are switched by the tap line to the interchange track with the Iron Mountain, a distance of about $\frac{1}{2}$ mile, or are hauled from and to the junction with the Rock Island, a distance of nearly 15 miles. (See map *ante*, p. 556.)

The country through which the tap line runs is a wilderness, the only towns being Warren and Hermitage, the respective junction points with the trunk lines. There is very little traffic except that supplied by the lumber company, although it is stated that there are one or two short spurs used by independent producers of staves, bolts, and ties, and there is an occasional movement of fertilizer or cottonseed. The annual report for the fiscal year 1910 shows but 1,539 tons of miscellaneous freight inbound and outbound out of a total movement of 170,527 tons, of which 2,120 tons was coal and 166,868 tons was forest products.

The tap line formerly enjoyed trackage rights over the Rock Island for the movement of logs, which were apparently being cut by the lumber company at points along that trunk line. The charge was 75 cents per train-mile, but the arrangement was discontinued in June, 1910.

This tap line, we find, belongs to the class of tap lines described in the original report herein. Its proprietary lumber company would be entitled to a reasonable allowance for switching its lumber to the Iron Mountain under the conditions there outlined.

EL DORADO & WESSON RAILWAY.

In 1904 the Edgar Lumber Company purchased a small mill at Wesson, Ark., which delivered its manufactured product to the Arkansas Southern Railroad, a subsidiary line of the Rock Island system, by means of a branch or spur track about 5 miles in length, owned by the Arkansas Southern but operated by the lumber company. This track joined the Arkansas Southern at a point known as Cornie Junction and was built of steel weighing only 20 and 30 pounds to the yard, the individual rails being from 6 inches to 30 feet in length. The capacity of the mill was increased, and its owners incorporated the El Dorado & Wesson Railway Company and built a track from the mill northward for about 10 miles to El Dorado, where a connection is had with the Rock Island and the Iron

Mountain. Before the tap line was built a contract was entered into with the Rock Island, which, in addition to providing for allowances to the tap line out of the joint rates on the one hand, and the delivery of the majority of its tonnage to the Rock Island on the other hand, contemplated that the Rock Island would contribute not to exceed \$100,000 toward the construction of the tap line. As a matter of fact, its contributions aggregated \$112,000, for which it demanded no note or other evidence of indebtedness from the lumber company or tap line. This amount had been repaid to the Rock Island at the date of the hearing, with the exception of about \$50,000. It was repaid in the sense that the Rock Island has retained its divisions to the aggregate of about \$75,000 on the outbound product of the lumber company. These divisions range from $1\frac{1}{2}$ to 5 cents per 100 pounds and average more than 4 cents. The contract provided for the repayment of the sum advanced by the Rock Island within a period of four years, but this has been wholly disregarded by the parties to it. Here, then, is a case where a lumber company acquires property of large value by an allowance made to it out of the rate on its traffic. The tap line claims to have expended \$50,000 for equipment. The record shows, however, that the equipment was purchased by the lumber company and turned over to the tap line in exchange for its capital stock to that amount. This is its only outstanding stock.

The equipment of the tap line consists of 1 locomotive, a passenger coach, 4 box and 3 flat cars. It runs one logging train daily in each direction, on which passengers and the mail are carried. The revenue from its passenger service for the fiscal year 1910, as reported to the Commission, was \$5,523.67, and a slightly less amount for the year 1911. Its total traffic for the year 1910 was 40,487 tons and its revenue thereon \$37,608.28, as reported to the Commission. Of this tonnage 36,433 tons is stated of record as the weight of the lumber forwarded by the Edgar Lumber Company. The traffic in farm products and supplies for settlers is small, although the country through which it runs is said to have been occupied as a farming community before the Civil War. El Dorado, the junction point with the trunk lines, is the county seat and has a population of 7,000. Wesson is apparently a mill town with about 800 inhabitants. There is a small cotton gin at Wesson and three or four merchants.

The lumber company owns an unincorporated logging track which is operated under the name of Cornie Valley Railroad, 12 to 15 miles being described as main line and the remaining 10 or 12 miles as spurs. This track extends westward from the mill into the timber. It is not so well built as the incorporated tap line and has some grades as high as 8 per cent. In the operation of the Cornie Valley railroad the lumber company uses 4 locomotives, 3 flat cars, 2 box cars,

and 75 logging cars, with which it hauls the logs to the mill. It appears that there is another small mill and some settlers in the vicinity of the Cornie Valley and that their freight is hauled to Wesson in about the same way that the El Dorado & Wesson hauls traffic for settlers along its lines, but the Cornie Valley claims not to hold itself out as a common carrier. It appears, however, that occasional carloads of staves are loaded along the Cornie Valley, and that its charge, amounting to about \$10 per car, is shown on the waybill as advances and collected from the consignee at Memphis or other destination. It is said that construction has begun on an extension of the El Dorado & Wesson southward to Homer, La., and that the citizens of that town, which is already served by the Louisiana & Northwest, have voted a tax. We infer from the record that the lumber company owns or proposes to acquire timber holdings in that direction.

In this case we fix the maximum division that this tap line may lawfully receive out of the rate at 2 cents per 100 pounds.

THORNTON & ALEXANDRIA RAILWAY.

The mill of the Stout Lumber Company is within a few feet of the line of the Cotton Belt in the town of Thornton, Ark., and has been in operation for about 25 years. The lumber company was formerly known as the Stout-Greer Lumber Company, and some 15 years ago built 18 miles of narrow-gauge track for the purpose of bringing in logs to the mill. In 1904 the Thornton & Alexandria Railway Company was incorporated; the lumber company declared a dividend to its stockholders payable in stock in the new corporation, to which it turned over the tracks and equipment. The line was then changed to standard gauge, the money for that purpose being furnished, apparently, by the lumber company, to which the tap line is now indebted in a sum exceeding \$80,000. The two companies are a part of the same general investment.

The tap line connects with the Cotton Belt at Thornton and runs in a southerly direction to Hampton, which is the county seat. The lumber company has about 5 miles of unincorporated logging tracks which connect with the tap line at Hampton. The tap line has 4 locomotives, 1 combination passenger car, 1 caboose, 9 freight cars, and 50 logging cars.

The lumber company owns about 70,000 acres of timberland, of which something over 20,000 acres have been cut over; the remaining timber will be exhausted at the present rate of cut in about 30 years. The tap line hauls the cars from the point where they are loaded, on the private logging spurs of the lumber company, through Hampton and over its own tracks to the mill, charging the lumber company

\$1.25 per 1,000 feet, log scale, for the service performed on the spurs. The manufactured lumber is loaded into cars standing on the tracks of the Cotton Belt. The tap line receives from the Cotton Belt a division on yellow-pine lumber of from 1 to 2½ cents per 100 pounds, the joint rate being the same as the Cotton Belt's rate from the junction point. There are no joint rates on hardwood lumber, although there are said to be a number of independent shippers of staves, bolts, and heading; those shippers pay the tap line a local charge of 5 cents per 100 pounds in addition to the rates of the Cotton Belt. The tap line also has some joint class and commodity rates out of which it receives a division of 15 per cent. The total traffic for the year ending June 30, 1910, as shown on its report to the Commission, was 63,372 tons, of which 3,367 tons was miscellaneous freight and the rest lumber and other forest products. It is said that there are a number of farmers and producers of freight in the country traversed by the tap line; and the town of Hampton is said to have a population of nearly 1,000, with some 19 stores. About 95 per cent of the entire tonnage is supplied by the controlling lumber company. The tap line runs one logging train daily in each direction, carrying passengers and the mail. Its revenue from passengers for the year 1910 aggregated \$2,648.96, and its earnings from mail and express \$1,396.83, its entire operating revenue for the year being \$42,995.92.

This tap line performs no service on the products of the proprietary lumber company moving out over the Cotton Belt; its haul of the logs to the mill we hold to be a plant service. We are now advised that a connection has been made with the Rock Island at Tinsman. If lumber from the mill moves through that junction the Rock Island may pay a division out of the rate not exceeding 1 cent per 100 pounds.

DONIPHAN, KENSSETT & SEARCY RAILWAY.

The sawmill of the Doniphan Lumber Company is at Doniphan, Ark., at the northern end of its tap line, known as the Doniphan, Kensett & Searcy, which connects with the Iron Mountain 1½ miles to the south at a point known as Kensett. The lumber company and the tap line are identical in interest, their stock being held by the same individuals. The tap line is also indebted to the lumber company in a sum exceeding \$35,000. The track from Doniphan to Kensett was constructed in 1906, when the mill was erected, the steel being leased from the Iron Mountain. Doniphan is a mill town with about 75 houses belonging to the lumber company; and the track from Doniphan to Kensett is used exclusively for the traffic of the lumber company and its employees.

In 1907 about 5 miles of track was constructed from Kensett westward to Searcy, a county seat with a population of about 3,000.

where a connection was effected with the Rock Island lines and the Missouri & North Arkansas Railroad. Although this track is used chiefly for the movement of logs for the lumber company, there is some outside traffic over it; and it runs parallel to the line of the Missouri & North Arkansas. It appears that there was formerly a line from Kensett to Searcy operated by mule power, and known as the Merchants Transportation Company, by means of which freight was transferred from the Iron Mountain to the town of Searcy; but this mule line was abandoned when the Doniphan, Kensett & Searcy was opened for operation. The Missouri & North Arkansas was afterwards built in through Searcy to Kensett and beyond, and the tap line enjoys trackage rights over it for a considerable distance northward from Searcy to the timber of the Doniphan Lumber Company. Utilizing this trackage right, for which a wheelage charge of \$1 per train-mile is apparently paid, the tap line hauls the logs to Searcy, and thence over its own rails through Kensett to the mill at Doniphan. For this movement it charges the lumber company 2 cents per 100 pounds. When the lumber is shipped out the tap line switches the cars to the Iron Mountain at Kensett, a distance of $1\frac{1}{2}$ miles, or removes them 6 miles to Searcy, where they are delivered to the Rock Island. In either case it receives a division of 3 or 4 cents per 100 pounds out of the joint rates. It also participates in through class rates to certain destinations, including Memphis and St. Louis, out of which it is allowed by the trunk lines 20 per cent or 25 per cent as a division. It does not carry passengers. More than 85 per cent of the whole traffic of the tap line for the fiscal year 1910 was supplied by the lumber company. While the country through which the tap line passes has largely been cleared of timber, the forest of the lumber company being located along the Missouri & North Arkansas as heretofore stated, the agricultural products handled by the tap line for the year 1910 aggregated only 662 tons.

The equipment of the tap line consists of 2 locomotives, 21 flat cars, and 2 cabooses, all having safety appliances. The lumber company has neither rolling stock nor unincorporated logging spurs, at least in the vicinity of the tap line. The employees of the tap line include two train crews, one section gang, two station agents, and two general officers. The officers and the agent at Doniphan are jointly employed by the tap line and the lumber company. Through bills of lading and through waybills for the movement of lumber are issued by the agent of the tap line at Doniphan. While apparently no dividends have been paid, there was a surplus on June 30, 1910, of \$14,265.14, indicating that the operation of the tap line under its allowances has been a profitable one.

For its service in switching to or from the mill, a distance of $1\frac{1}{2}$ miles, to the Iron Mountain at Kensett, the latter may allow this tap line a switching charge of \$2.50 a car; for its service in switching the products of the controlling mill through Kensett, a distance of 6 miles, to the Rock Island at Searcy, the latter may allow the Doniphan, Kensett & Searcy a division out of the rate of 1 cent per 100 pounds.

FOURCHE RIVER VALLEY & INDIAN TERRITORY RAILWAY.

The Fourche River Valley & Indian Territory Railway Company and the Fourche River Lumber Company are identical in interest. The mill is at a company town known as Graytown, less than a mile from the line of the Rock Island, and was erected in 1903. Before the machinery was installed a track was built from a point on the Rock Island then known as Esau, but now in the town of Bigelow. When the mill was opened this track was extended south and west for the purpose of reaching the timber, and in August, 1905, when the railroad corporation was formed, was about 9 miles in length. There is some obscurity in the record, but apparently the track was operated previous to 1905 in the name of the Arkansas River & Southern Railway, which purported to be a common carrier. When the Fourche River Valley & Indian Territory was incorporated, capital stock to the amount of \$220,000 was issued in exchange for the equipment and tracks then laid and in operation. Subsequently an additional 6 miles was constructed at an expense of about \$80,000, and bonds were issued to the lumber company therefor in the sum of \$100,000. The tap line, as described of record, is standard gauge, laid with 56-pound steel and having substantial bridges. It extends from Bigelow, a town on the Rock Island, to Bellevue, a distance of 15 miles, with about 2 miles of side track. At a switch known as Wye, about 9 miles from Bigelow, unincorporated logging tracks connect with the tap line and reach out into the woods. The tap line has 1 locomotive, 1 combination passenger and baggage car, 1 tank car, and 61 freight and logging cars. The lumber company itself owns two locomotives, which it operates on the logging tracks. The tap line has a two-story building at Graytown, used as a station and office, with small sheds and a loading platform at one or two other points. It apparently uses the Rock Island station at Bigelow, and it weighs carload shipments on the lumber company's track scale at Graytown.

The logs are loaded by the employees of the lumber company on the unincorporated tracks and are taken by the tap line from Wye to the mill; a charge of 2 cents per 100 pounds is made for this service. The manufactured product is subsequently moved by the tap

line from the mill to the Rock Island, less than a mile away. The Rock Island allows out of the joint rates, which are the same from the mill at Graytown as from the junction, a division of from 2 to 3 cents per 100 pounds.

The tap line operates two logging trains daily in each direction with a coach, but its passenger revenues for the fiscal year 1910 were only \$1,100. Its principal tonnage is forest products, amounting for the year 1910 to 142,359 tons, of which 31,176 tons was lumber. It moved during the same period 3,825 tons of miscellaneous freight, including nearly 2,000 tons of coal. The record indicates that 6,082 tons of freight moving outbound and 448 tons moving inbound were furnished by others than the proprietary company, or an aggregate of about 5 per cent of its traffic. It does not participate in through rates on articles other than forest products, and its local charges on merchandise are not filed with the Commission. The joint rates on lumber, staves, etc., from points west of the mill at Graytown are 1 cent per 100 pounds higher than the rates from the mill; and the allowance made to the tap line on movements from west of Graytown are increased by that amount. There are said to be two or three small mills in the vicinity that team their lumber to the tap line. The Neimeyer Lumber Company has extensive timber holdings in the near vicinity of the Fourche River Valley tap line, but it has a tap line of its own, known at the Little Rock, Maumelle & Western, reaching that timber. An effort is being made to colonize the cut-over lands and new settlers are coming in. It is hoped that it will develop into a farming country.

The operations of the tap line have been unusually profitable, and it has paid dividends aggregating more than \$100,000. The assets on June 30, 1910, amounted to \$341,000, including a surplus of \$17,000 remaining after the payment during that year of a 16 per cent dividend amounting to \$35,200.

On August 9, 1904, a contract was entered into by the Rock Island lines with the Arkansas River & Southern Railroad, and this has been assigned to the Fourche River Valley & Indian Territory. It provides for the payment of divisions to the tap line, and requires that not less than 50 per cent of its traffic shall be given to the Rock Island.

In this case the Rock Island may lawfully allow the tap line a switching charge of \$1.50 for moving the products of the controlling mill at Graytown to the junction point, a distance of nearly 1 mile.

BLYTHEVILLE, LEACHVILLE & ARKANSAS SOUTHERN RAILROAD.

The precise relation between the Blytheville, Leachville & Arkansas Southern Railroad Company and the Chicago Mill & Lumber
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Company is not disclosed of record; but there is a community of interest which amounts to a domination, if not full ownership of the tap line by the lumber company. Moreover, the tap line is operated primarily as a facility for bringing logs to the mill of the lumber company, which is in the vicinity of Blytheville, Ark., at a point known as Glenco, and has a capacity of 75,000 feet per day. The rails of the Jonesboro, Lake City & Eastern extend through the plant inclosure.

The Blytheville, Leachville & Arkansas Southern Railroad Company is described on the brief as operating 52 miles of road, extending from Blytheville, Ark., through Arbyrd, Mo., to Shaw, Ark. Its annual report for the year 1910, however, shows an aggregate of 7 miles of track owned; and the report for 1911 shows 19.11 miles, all in the state of Arkansas. It, in fact, owns and operates a main track running northward from a point in the timber, known as Shaw, for about 17 miles to Leachville. This track was constructed on a survey made for a proposed extension of the Frisco, which terminates at Leachville, where it meets the east and west lines of the Jonesboro, Lake City & Eastern. From Leachville the tap line enjoys trackage rights over the Frisco, crossing the state line into Missouri, a distance of 8 miles, to Arbyrd. From Arbyrd it has trackage rights eastward over the Paragould Southeastern Railway, a part of the Cotton Belt Route, for 22 miles, again crossing the state line to Chickasawba. From that point it has tracks extending to the mill at Glenco and to connections with the Jonesboro, Lake City & Eastern and Frisco railroads at Littleton and Blytheville. The length of these tracks aggregates $2\frac{1}{2}$ miles. It therefore will be seen that the tap line owns two sections of track, one reaching the timber south of Leachville and the other in the vicinity of the mill; and that these tracks are connected by means of running rights over the trunk lines. There is a three-party contract between the tap line, the Frisco, and the Paragould Southeastern which restricts the trackage privilege to the operation of freight trains on which the tap line transports no freight "except that which originates on its own rails and is destined to points on its own rails." The agreement names a wheelage charge of 50 cents per train-mile, in addition to which it provides for the payment to the trunk lines of 95 per cent of the gross charges earned by the tap line on all freight hauled over the tracks in question except logs and other forest products in the rough. The plain intention of the contract, therefore, seems to be to restrict the trackage rights enjoyed by the tap line to the movement of forest products.

The tap line was incorporated in May, 1908, and took over tracks built and owned by the Chicago Mill & Lumber Company in the

vicinity of Glenco and 5 miles of track extending south from Leachville. It also acquired from the lumber company 10 miles of track and right of way extending south and west from a point called Big Lake on the Jonesboro, Lake City & Eastern. This track was promptly abandoned and the rails used in extending the line south of Leachville, the lumber company exchanging 10 miles of new right of way south of Leachville for the 10 miles south of Big Lake.

It is said that an extension of the tap line is contemplated southward to Truman, a point on the Frisco's line from Memphis to Kansas City, where a large veneer and sawmill plant is under construction, which is expected to furnish a considerable tonnage moving to Cairo. Other large claims are made of outside traffic now existing or in future prospect. It is admitted, however, that during the 10 months ending October 31, 1910, 96.6 per cent of the entire tonnage of the tap line was furnished by the Chicago Mill & Lumber Company. On the brief it is claimed that during a later period the outside tonnage increased 131 per cent; but this would indicate the traffic in which the lumber company had no interest as less than 10 per cent.

The equipment consists of 6 locomotives, one of which is out of service, 86 flat cars, 2 cabooses, 1 box and 2 coal cars. It has a track scale at the mill, and one of its employees is a sworn weighmaster of the weighing and inspection bureau. It has 3 train crews and 27 sectionmen. The only station building is a joint depot at Leachville. It operates a "passenger service" over the track from Leachville to Shaw, with "four trains daily" that meet the trains of the trunk lines; but its passenger earnings for the fiscal year 1911, as reported to the Commission, were but \$1,181.37; its only passenger equipment shown of record is two cabooses. The miscellaneous freight shown on its report for that year as originating on its line was 462 tons of grain and hay and 132 tons of merchandise, and the only inbound traffic was 237 tons of bituminous coal. The volume of forest products for the same year aggregated 163,357 tons, of which 30,548 tons was lumber. There are said to be several independent lumber companies that have mills along the main track south of Leachville, but the traffic which they give the tap line is apparently inconsiderable, although not stated of record. It may be well to explain that this general territory is honeycombed with the tracks of tap lines already constructed or proposed to be extended.

Here we have another tap line owning two separate pieces of track widely separated, which are connected under trackage rights over trunk lines. One of the connecting carriers runs immediately through the mill plant, but makes no allowance to the tap line. The rights of way of the other two connecting carriers apparently lie about 2 miles from the mill, and they make the tap line an allowance of 2 cents per 100 pounds. We regard this as unlawful. As their

lumber rates extend to the mill they may under section 15 reasonably compensate the lumber company for switching the lumber to their lines, but only if the distance from the mill to the trunk line rails is in excess of 1,000 feet.

GOULD SOUTHWESTERN RAILWAY.

The record with respect to the Gould Southwestern Railway Company, and the lumber interests with which it is or has been affiliated, is far from satisfactory. The impression sought to be conveyed is that there is an entire absence of any community of interest between the tap line and any lumber company, but the facts appearing of record and disclosed by our own investigations by no means confirm any such assertion. The officers of the Gould Southwestern are officers of a large lumber manufacturing and selling company at Chicago. The record indicates that previous to 1906 a corporation known as the Estabrook Lumber Company operated a sawmill near Gould, Ark., which was sold or transferred in that year to the Newhouse Mill & Lumber Company. As a facility in the operation of the mill the vendees constructed about 5 miles of track extending southwestwardly from a point known as Bonner, crossing and connecting with the Iron Mountain at Gould, and terminating at another point known as Webber. This track was turned over to a corporation formed by the lumber company and known as the Gould Southwestern Railway Company, having a capital stock of \$51,000, which was exchanged for the right of way and distributed among the stockholders of the lumber company. In addition to this stock the tap line is indebted to the lumber company for loans exceeding \$100,000. The Newhouse Company, which apparently still controls the Gould Southwestern, claims to have gone out of the lumber business in this county, leasing its mill to one R. L. Muse, and selling its company store. It claims also to have disposed of most of its timber holdings in that vicinity to various parties having no relation to the lumber company or the tap line. In other words, the Newhouse Company is described on the record as in a state of liquidation, having permanently retired from the lumber business. There is nothing on the record to indicate that the product of the mill which the controlling company has leased to Muse is not marketed by the same interests that control the tap line; nor is there a definite statement indicating that the controlling interests do not have timber holdings that will be reached by proposed extensions of the tap line which are referred to on the record.

The track of the Gould Southwestern as in operation at the date of the hearing was laid from Bonner through Gould to Star City, a total distance of 17.6 miles. Its equipment consisted of two loco-

motives, a combination coach, and a wrecking outfit. It had no freight cars, using for such traffic as it was able to secure the cars furnished by the trunk line. There are two logging trains daily in each direction, operated on regular schedules and carrying from 800 to 1,000 passengers monthly. More than 90 per cent of its tonnage during the period prior to the hearing was forest products, the remainder being cotton, other agricultural products, and general merchandise. Star City is a town of several hundred inhabitants, with a dozen stores, and there are one or two other small villages along the line, the inhabitants depending no doubt largely on the sawmills for their employment. The tap line charges from \$5 to \$12 per car for hauling logs to the mill, being the regular Arkansas scale. On shipments from the mill operated by Muse, which is within one-eighth of a mile of Gould, joint rates that are the same as the Iron Mountain publishes from its local station at Gould are applied, and an allowance of 2 cents is made therefrom to the tap line. From other points on the tap line an arbitrary of from 2 to 5 cents per 100 pounds is added to the rate published by the Iron Mountain from the junction point; and the tap line receives the entire arbitrary in addition to the 2 cents allowed out of the earnings of the Iron Mountain. In other words, the seven or eight mills along the line that are described as independent pay from 2 to 5 cents per 100 pounds more than the mill leased by the controlling interest to Muse.

In this case no allowance out of the rate may be made, the mill of the controlling company being within a few hundred feet of the trunk line.

PRESCOTT & NORTHWESTERN RAILROAD.

The Prescott & Northwestern Railroad Company is an example of a well-equipped tap line which does a substantial outside business, only 75 per cent of its traffic being that of the Ozan Lumber Company, with which it is affiliated. The tap line has no branches and extends from Prescott, Ark., where it connects with the St. Louis, Iron Mountain & Southern in a westerly direction for about 40 miles to a point in the woods where it meets the unincorporated logging road of the lumber company. At Tokio (see map, *post*, p. 573), a small settlement with one or two stores and less than 100 people, it crosses another incorporated tap line that is a party to the record, and which is known as the Memphis, Dallas & Gulf. There are several other small settlements along the Prescott & Northwestern, the largest of which has a population of 100 people, with five or six stores, a sawmill, gin, and canning factory. There are also three or four small independent sawmills in the country tributary to its road, all of which bring their logs in by wagon; one or two of the

mills also haul their manufactured lumber several miles over to the tap line for shipment. The principal outside industry on the Prescott & Northwestern is a peach orchard established three or four years ago, having 2,000 acres of trees, from which many carloads of peaches were shipped during the past year to St. Louis; this traffic is developing rapidly. Seventy carloads of cantaloupes moved out over the Prescott & Northwestern in 1911. It is the assertion that the construction of this line has resulted in building up several small communities, and that there is great promise of future agricultural development along its line.

The Prescott & Northwestern has 6 locomotives, 101 freight cars, and 1 combination passenger and baggage car. Most of the equipment has safety appliances. Its road is substantially and permanently built, with 54 and 63 pound rail laid on gravel ballast. It has one or two station buildings; and its trains are dispatched by telephone. There are four section gangs and two train crews. It employs six station agents, of whom all but one are storekeepers, paid a commission. In addition to carrying the mails and express 15,000 passengers were transported during the year 1910. There are two trains daily in each direction, one a mixed train and the other a passenger train, which from Tokio runs over the Memphis, Dallas & Gulf for 7 miles to Nashville, a town of 3,000 people. There is an arrangement by which the lines divide the revenues for this joint-passenger service. The record indicates that the tap line was organized in 1890, the mill being opened at the same time, and 8 or 9 miles of its line were built from Prescott out into the woods. It is said, however, that the lumber company then operating the mill had no direct interest in the road. Financial difficulties were encountered, however, and in 1892 the tap line was sold to Bemis & Whitaker, who were subsequently bought out by the Ozan Lumber Company. The tap line was extended to its present terminus, known as Helbig, about the year 1906.

The present capitalization of the Prescott & Northwestern is \$30,000, having been reduced from \$125,000. It has no bonds; but it is indebted to the Ozan Lumber Company for money borrowed to the extent of \$570,000, of which \$350,000 is secured by a mortgage. The stockholders of the two companies are identical and hold their shares in the same proportion. It is admitted that the tap line has been financed by the lumber company, and they have the same principal officers. The bookkeeper of the lumber company serves the tap line as auditor, without additional salary.

The timber holdings of the Ozan Lumber Company aggregate 40,000 acres, or upward of 250,000,000 feet, and were acquired between the years 1900 and 1907. The mill is in the village of Prescott.

about 1,000 feet from the right of way of the Iron Mountain; but the track on which lumber is loaded connects with the tap line at a point which for convenience is referred to as Dian. The logs are brought from Helbig, the beginning of the unincorporated logging spurs, to the mill by the tap line under the contract rate of \$1 per 1,000 feet, log scale, for the haul of 41 miles. The charge is intended also to cover rental for the rails and fastenings furnished by the tap line for the use of the lumber company in its logging spurs. No bills of lading or other shipping papers are issued for the movements of the logs to the mill. The outbound lumber is switched by the tap line from the mill to the interchange track of the Iron Mountain, a distance of about 1,200 feet; and the bills of lading issued by the tap line's agent show Dian as the point of origin. So far as the billing is concerned, the traffic, therefore, does not move on a milling-in-transit basis. The rates, however, from Dian, the mill point, are the same as from Helbig, at the farther end of the tap line, and are the same as the Iron Mountain rate from the junction point. And the officials of the tap line admit that its division of from $3\frac{1}{2}$ to 6 cents per 100 pounds received from the Iron Mountain out of the joint rates is intended also to take care of the cost of hauling the logs into the mill. There is a division of only 1 cent on the rate to Texas points.

In moving the lumber from the mill of the proprietary lumber company to the Iron Mountain we think that this line may be said to perform a service of transportation, or a switching service, for which it may be reasonably compensated out of the rate. It is clear, however, that the divisions allowed are altogether beyond reason, and that an allowance out of the rate of \$1.50 a car is all that lawfully may be paid by the trunk line.

CADDO & CHOCTAW RAILROAD.

We are definitely advised that since the submission of this proceeding the tap line known as the Caddo & Choctaw Railroad has been taken over by the Memphis, Dallas & Gulf, another tap line that is party to the record and which is hereinafter discussed. We shall therefore make only a brief statement of the principal facts shown of record with respect to the Caddo & Choctaw. It was incorporated in 1907, and the first 4 miles of its track connecting with the Iron Mountain at Rosboro, Ark., and extending into the woods was constructed. In addition to this track, the Caddo River Lumber Company, in whose interest the tap line was incorporated and owned, had an unincorporated logging track about 2 miles in length. Subsequently extensions of the tap line were laid, until at the time of the hearing it had about 14 miles of track running from Rosboro to a

point known as Cooper, about a mile and a half from a town of 500 people known as Daisy. The statement on the record was that the people of Daisy were moving over to Cooper. Each holder of two shares of the Caddo River Lumber Company held one share in the railroad corporation. The latter was indebted to the lumber company in a sum exceeding \$100,000 for money advanced for the construction of the line.

The mill of the lumber company was about one-fourth of a mile from the Iron Mountain station at Rosboro. It had at the time of the hearing several miles of unincorporated logging tracks connecting with the tap line at various points. The tap line had 1 locomotive and 18 cars, used chiefly in hauling the logs to the mill, for which service a charge of 50 cents per 1,000 feet, log scale, was made against the lumber company, there being no tariff covering the charge. The tap line also switched the lumber from the mill to the Iron Mountain, and received out of the earnings of that company a division of 4 cents per 100 pounds, except to a limited territory, where the division was only 2 cents. On shipments to points within the state of Arkansas the tap line's charge of 4 cents was added to the rate of the Iron Mountain, there being no joint rate.

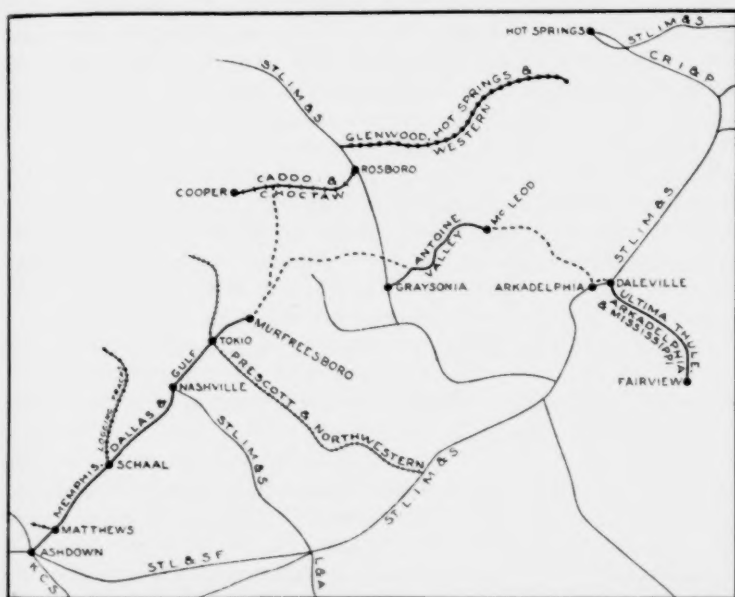
The record indicates that no logs were hauled for others than the controlling company, but there were a few outside shippers of staves, etc. Out of its total traffic of 150,000 tons for the fiscal year ending June 30, 1910, more than 95 per cent was the logs and lumber of the proprietary company. Very little merchandise freight was handled and no charge was assessed on less-than-carload movements. There were two or three carloads of fertilizer, cottonseed meal, and cake. A single log train was run daily in each direction, on which passengers were permitted to ride at their own risk, without charge. Out of the aggregate earnings of \$19,688.62 for the fiscal year 1909, only \$27.96 accrued on traffic in which the lumber company was not directly interested. The following year the operating revenue was \$24,550.53. It files annual reports with the Commission.

As its facilities and practices are described on the record, it is apparent that the Caddo & Choctaw was nothing more or less than a facility of the plant of the Caddo River Lumber Company.

In disposing of its ownership of this tap line the Caddo River Lumber Company reserved a trackage right over it for its own logging trains, and in this manner the lumber company continues to haul logs from its forest to its mill. That is our information, and we do not understand that it receives any allowance out of the rate. If, as probably is the case, the Memphis, Dallas & Gulf switches the lumber from the mill to the Iron Mountain rails, it is entitled to receive for the service nothing beyond a reasonable switching charge, which we fix at \$1.50 a car.

MEMPHIS, DALLAS & GULF RAILROAD.

The Memphis, Dallas & Gulf Railroad Company is controlled, through the ownership of practically its entire capital stock, by the stockholders of the Graysonia & Nashville Lumber Company; but the railroad corporation has separate officers who are not employed by the lumber company, with the exception of its traffic manager, who receives no salary from the railroad and is general manager of the lumber company. It was incorporated in 1906 as the Memphis, Paris & Gulf, the corporate name being changed on June 1, 1910, when it took over the operation of two other tap lines known, respectively, as the Antoine Valley Railroad and the Ultima Thule.



Arkadelphia & Mississippi Railway. The tracks of the three tap lines that are now consolidated and known as the Memphis, Dallas & Gulf are separate and disconnected, but form a part of a single proposed route. They are shown on the map herewith and may be briefly described and their history stated as follows:

The Memphis, Paris & Gulf, prior to 1910, consisted of about 41 miles of track extending in a northwesterly direction from Ashdown, Ark., through Nashville and Tokio to Murfreesboro. It connected with the Kansas City Southern and Frisco at Ashdown, with the Iron Mountain at Nashville, and at Tokio with the Prescott & Northwestern, another tap line which is a party to this record. The construc-

tion of the track from Ashdown to Nashville was apparently begun early in 1906; but the 15 miles from Nashville to Murfreesboro was not laid until 1908. The Memphis, Paris & Gulf was controlled by the Nashville Lumber Company, which had a large mill on its tracks at Nashville, about one-half mile from the junction with the Iron Mountain. The timber holdings of that company west of Nashville were quite extensive, and it had many miles of logging tracks connecting with the incorporated road at various points.

The Antoine Valley Railroad Company was controlled by the Grayson-McLeod Lumber Company, and was operated in the interest of its mill at Graysonia, Ark. The track connected with the Iron Mountain at that point and extended several miles through the land and timber of the controlling company. We understand that the title to the railroad right of way was vested in the lumber company. The mill was within one-half mile of the Iron Mountain, and the tap line switched the lumber for that distance. It received a division from the trunk line of from 2 to 5 cents per 100 pounds. It did not haul the logs to the mill.

The same interests that owned the Antoine Valley also controlled the Ultima Thule, Arkadelphia & Mississippi Railway, which had about 17 miles of track connecting with the Iron Mountain at Daleville, near Arkadelphia, Ark., and extended eastward to a point known as Fairview. The mill of the Grayson-McLeod interests when in operation several years ago was at Daleville, but it was dismantled and apparently removed to Graysonia when the yellow-pine timber was cut out, the only mills remaining on the Ultima Thule tap line being hardwood mills that are apparently not owned or controlled by the Grayson interests.

In the summer of 1910 the Nashville Lumber Company and the Grayson-McLeod Lumber Company were consolidated as the Graysonia-Nashville Lumber Company, and at the same time the Memphis, Dallas & Gulf took over the operation of the tap lines described. The consolidated tap line as described on the record consisted at the date of the hearing of the three detached sections of track already described, being respectively 41, 6, and 17 miles in length; the intervening gaps are "under construction," as is stated. The owners have in contemplation, as they assert, an extension of the line for about 190 miles southwestward to Dallas, and to the north it has approached within 200 miles of Memphis. It also announces the intention, expressed by most of the tap lines on the record, of building into Hot Springs, Ark.

The Commission is advised that since the hearing the Memphis, Dallas & Gulf has acquired two other properties, one being the logging road of the Clark Lumber Company, known as the Glen-

wood, Hot Springs & Western Railroad, and extending for 20 miles southward from a point near Hot Springs. It has also purchased the Caddo & Choctaw Railroad, the track and operations of which are hereinbefore described. The intention of the Memphis, Dallas & Gulf in absorbing these two roads is said to be to connect them up with its own line and thus accomplish its desire to get into Hot Springs.

In addition to its officers, the Memphis, Dallas & Gulf claims to have 5 clerks, 10 station agents, 6 train crews, 46 track men, and a number of other employees. It is said that none of its agents are employed by the lumber company. It has station buildings at seven points on its disconnected lines.

The equipment consists of 5 locomotives, 4 passenger cars, 9 freight cars, and 5 other cars. The controlling lumber company itself owns and operates 4 locomotives and about 130 cars. The tap line runs two trains daily in each direction between Ashdown and Murfreesboro on which passengers are carried; the record does not indicate whether lumber and other freight moves in the same trains. The Prescott & Northwestern apparently runs a single train, carrying passengers, over this tap line under trackage rights between Tokio and Nashville, the Memphis, Dallas & Gulf receiving one-third of the passenger earnings. A single "mixed train" is operated daily over the track formerly known as the Ultima Thule tap line, on which a few passengers are apparently carried. The only service over what was formerly the Antoine Valley is logging trains, which seem to be run irregularly.

The annual report for 1910 indicates a passenger revenue of \$24,488.54; express revenue, \$1,283.79; and mail, \$1,623.30. During the same year the aggregate freight movement was 446,894 tons, of which 177,388 tons were forest products. These figures include the logs hauled by the lumber company itself under trackage rights. The proprietary company supplied 35,202 tons of forest products and about 130,000 tons of logs. Sand and gravel aggregating 250,980 tons were taken from a pit owned by the tap line and sold by it to connecting carriers; about 80 per cent of the inbound coal movement, amounting to 5,272 tons, was consigned to the railroad company itself. Steel rails weighing 204 tons were handled on account of the lumber company for use in its spurs. The outside tonnage included 7,090 tons of lumber for others than the proprietary company, and a small amount of other freight, the total outbound movement of agricultural products being 3,657 tons. The figures given are all for the year ending June 30, 1910, and as the consolidation of the three companies did not take place until June 1 of that year the figures practically relate only to what was formerly the

Memphis, Paris & Gulf. The report to the Commission for the fiscal year ending June 30, 1911, during which the entire property was operated by this company, indicates an aggregate freight movement of 167,939 tons, of which forest products comprised 86,966 tons, or about 52 per cent; there were 55,600 tons of sand and gravel and 5,850 tons of coal. The outbound movement of cotton and other products of agriculture amounted to 6,383 tons.

The lumber company has about 30 miles of unincorporated logging tracks connecting with the tap line at various points, particularly at Schaal and Matthews, on the original Memphis, Paris & Gulf. It also has trackage rights for the operation of its logging trains over the tap line to the mill at Nashville, paying therefor a wheelage charge, which was formerly \$5 per car, but was reduced to 50 cents per car on June 1, 1910. The lumber company therefore loads the logs on the logging spurs in the woods and hauls them all the way to the mill, paying the tap line 50 cents per car for the privilege of using its tracks. The tap line has never hauled logs for the lumber company, but does so for some independent producers. The tap line switches the empty and loaded cars for lumber movement between the mill at Nashville and the interchange track with the Iron Mountain, a distance of about one-half a mile. In the case of traffic moving out over the Kansas City Southern it hauls the cars a distance of 27 miles to Ashdown. The traffic from the Nashville mill is divided about equally between the two trunk lines, which allow the same divisions, varying from 4 to 6½ cents per 100 pounds, out of their rates on yellow-pine lumber.

In view of the extent of the passenger traffic over the Nashville division, the volume of the outside freight traffic over that disconnected part of this tap line is surprisingly small. For the service of the tap line in handling the products of the mill at Nashville the Iron Mountain may allow it out of the rate a switching charge of \$2; the connecting carriers at Ashdown may allow it out of the rate divisions not exceeding 2 cents per 100 pounds.

The lumber company also has private logging tracks connecting with the Antoine Valley division of the tap line at Graysonia and Leard. The logs are hauled by the lumber company to the mill at Graysonia in the same way and under the same trackage charge as applies in connection with the mill at Nashville. The tap line switches the lumber from the mill at Graysonia for a distance of about 500 feet to the Iron Mountain, which pays it an allowance of from 4 to 6½ cents per 100 pounds. We do not understand from the record that any outside traffic moves over these tracks.

The allowances paid on the movement of lumber from this mill we regard as wholly unlawful under the principles announced in the

original report. No allowance at all may properly be paid on the lumber of this mill.

As heretofore stated, the proprietary company has no yellow-pine mill on the so-called Ultima Thule division, but there are several hardwood mills on that track, which have the benefit of the junction-point rate from their mills to certain destinations, but to other territory have to pay an arbitrary over the rate of the trunk line, the additional charge amounting in some cases to as much as 5 cents.

The tap line also interchanges a considerable tonnage of lumber with the Prescott & Northwestern at Tokio. On such traffic received from the other tap line the Memphis, Dallas & Gulf has a division of 2 cents per 100 pounds for the haul over its line.

We have already referred to the acquisition by the Memphis, Dallas & Gulf of the incorporated tap line of the Caddo Lumber Company, known as the Caddo & Choctaw Railroad, and of the unincorporated line of the Clark Lumber Company, named the Glenwood, Hot Springs & Western. The vendors of these properties, by a formal agreement with the Memphis, Dallas & Gulf, reserved to themselves the privilege of operating logging trains over the tracks in question at a charge of 50 cents per carload. This arrangement has apparently become effective; if so, it is unlawful. We do not understand that a shipper may have a preference over other shippers in the use of a line that claims to be a common carrier.

CRITTENDEN RAILROAD.

The stockholders of the Crittenden Lumber Company own \$143,000 of the capital stock of the Crittenden Railroad Company, which aggregates \$150,000. Part of the remainder is held by persons in one way or another connected with the lumber company, but stock amounting to \$5,000 is owned by the president of the tap line, who was formerly interested in the mill, but who claimed at the time of the hearing to have no interest of any kind in the lumber company or in any other industry served by the tap line or in its vicinity. The lumber company owns about 75 per cent of the timberland tributary to the tap line.

The track of the Crittenden Railroad Company extends from Earle, a point on the Iron Mountain about 25 miles west of Memphis, southward for 15 miles to a connection with the Rock Island, at Heth, and then a mile or two beyond. There are 3 or 4 miles of logging spurs and sidetracks. It was incorporated in August, 1905, when 7 or 8 miles were already in operation as a private logging road, the constructing of the line having been begun by the lumber company as long ago as 1899; the track was built into Heth in 1908. The tap line has 2 locomotives, 3 box cars, 1 flat car, and 19 logging cars. It

hauls the logs from the forest to the mill, which is about $2\frac{1}{2}$ miles south of Earle, charging the lumber company \$5 per car. The mill manufactures hardwood only, and its product moves in about equal proportions over the two trunk lines, the haul over the tap line to the Iron Mountain being about $2\frac{1}{2}$ miles and to the Rock Island over 13 miles. Each of the trunk lines makes an allowance of 2 cents per 100 pounds out of its rates to Memphis, Cairo, St. Louis, and Kansas City. On shipments moving to points where there are no divisions in effect the tap line makes a local charge in addition to the rate of the trunk line.

There are said to be seven manufacturing plants served by the tap line in which neither the Crittenden Lumber Company nor the owners of the tap line have any interest; the tap line charges the regular local rates for the movement of logs to these independent mills. It is also claimed that less than 75 per cent of the entire traffic is supplied by the controlling lumber company. Passengers are carried free in the caboose. For the fiscal year ending June 30, 1910, the aggregate freight moving was 78,805 tons, of which 55,719 tons was logs, lumber, and coal for the Crittenden Lumber Company, and 23,186 tons was merchandise and other commodities handled for the public, as is said. It is of interest to observe, however, that a substantial portion of the outside tonnage claimed by the tap line originated at or was destined to the town of Earle, which is served by the Iron Mountain. In other words, the Rock Island, in connection with the tap line, now divides with the Iron Mountain the traffic of the town of Earle. For example, one of the witnesses on the hearing was a merchant at Earle, whose cotton gin is on a sidetrack connecting with the Iron Mountain. He drays a considerable quantity of cotton to the tracks of the Crittenden Railroad, and the cars are then routed through Heth and over the Rock Island to Memphis.

The tap line files annual reports with the Commission, but the information given is far from complete; and the record indicates that its accounts are not kept in accordance with the regulations of the Commission.

In this case we think that an allowance out of the rate of 2 cents per 100 pounds on the product of the mill may lawfully be made to the tap line by the Rock Island and that for its short switching service to the Iron Mountain rails the latter may lawfully allow a switching charge of \$3.

WILSON NORTHERN RAILWAY.

The Wilson Northern Railway was originally constructed as a private logging road extending from the sawmill situated at a point now known as Wilson, Ark., about 1 mile from the Mississippi River, northward for 10 miles into the timber. There was at that time no trunk line in the vicinity. The Frisco was subsequently extended

through and is now joined by the tap line at Wilson. In addition to the 10 miles just mentioned the record states that the tap line operates about $7\frac{1}{2}$ miles of track extending northward from its own terminus to a connection with the Jonesboro, Lake City & Eastern at Ross. This track was owned by Moore & McFerren, a lumber firm, and has been purchased by the Wilson Northern since the hearing. The tap line also has trackage rights over the Frisco for a distance of about 21 miles from Deckerville to Wilson, paying the Frisco \$4 per loaded car and \$2 per loaded truck. The equipment consists of 3 locomotives, 1 caboose, 2 box cars, and 15 flat cars.

The Wilson Northern Railway Company was incorporated in December, 1904, with a capital stock of \$100,000, which is held by the same persons who owned the stock of Lee, Wilson & Company, which operates the mill at Wilson. The two companies have the same principal officers.

The tap line hauls the logs from the point of loading on its own track or from the spurs on the Frisco near Deckerville to the mill. The mill is reached by a spur track about a mile and a half long, owned by the Frisco, and the tracks of the tap line do not reach the mill. Nevertheless the tap line, as a matter of fact, switches the lumber over the spur track to the point from which it is actually taken by the Frisco engines. The record does not describe any movements of lumber from the mill northward over the line of the tap line, and the track formerly owned by Moore & McFerren to Ross; and apparently shipments were not routed that way prior to the hearing. The Frisco allows the tap line 2 and 3 cents per 100 pounds out of the joint rates, which are the same from points on the tap line as from the junction point with the Frisco, except from Ross, where the rate is one-half cent higher, the division of the tap line being increased by that amount. In addition to these allowances out of the trunk line's earnings the tap line charges the lumber company 2 cents per 100 pounds for hauling the logs to the mill.

At the time of the hearing the Wilson Northern did not carry passengers, mail, or express matter. Mention is made on the record of a small independent sawmill and a manufacturer of staves and heading. Out of a total movement of 85,635 tons during the fiscal year 1910, the volume of logs and lumber amounted to 81,780 tons, of which about 85 per cent was furnished by the proprietary company. There were 4,253 tons of merchandise and agricultural products, a substantial portion of which was doubtless consigned to the store of the lumber company, although there are one or two independent stores on the line.

We are advised that on September 15, 1911, the Wilson Northern was leased to the Jonesboro, Lake City & Eastern Railroad Company, by which it is now operated, the rental reserved by its owners

being \$12,000 per annum. The Jonesboro, Lake City & Eastern has over 100 miles of road, operates regular passenger trains, and has a general freight-train movement under tariffs filed with the Commission. We had not understood that the tap-line question had any application to it. Nevertheless, it has failed to make annual reports to the Commission. It is apparent that the situation with respect to these lines needs further examination; and we shall withhold announcement of any conclusion respecting the Wilson Northern or the tracks formerly operated by it. We shall look to the trunk lines, however, to give effect to the general views that we have expressed in this proceeding.

MANILA & SOUTHWESTERN RAILWAY.

The Manila & Southwestern Railway Company is apparently owned by four brothers, named Taylor, who bought the property in at a foreclosure sale in 1907 for an amount approximating \$28,000. The record indicates that they had previously advanced the money used in its construction. Two of the brothers seem to have acquired at the same time a sawmill at Lunsford, Ark., at the northern end of the tap line, while the other brothers have extensive farms on the line. The track is five miles in length and extends from Lunsford to Herman, where it connects with the Frisco. In addition to the mill at Lunsford, which is of comparatively small capacity and which was closed down from 1907 to 1909, there is a cooperage plant on the tap line about 1,000 feet from its connection with the Frisco; and there is another small sawmill about one-half mile from Herman.

The tap line has one locomotive, a flat car, and a caboose, which make a regular daily round trip. Passengers are carried, but the record gives no indication whether fares are paid or of the revenues from that source.

The tap line does not file annual reports with the Commission and we have little information respecting its traffic. The statement made on the record is that during the year 1909 the Taylor interests supplied only 10 per cent of the traffic. During a considerable portion of that year their mill was closed down. During the first six months of the calendar year 1910 a statement filed of record shows the movement of 15,584 tons of logs, 1,927 tons of lumber, about 140 tons of merchandise, and 8 tons of cottonseed. We are not told what proportion of this traffic was furnished by those not interested in the tap line, nor does the record indicate whether there are logging spurs or the manner in which the logs reach the mill. It is stated, however, that some logs are moved by the tap line to Herman and thence by the Frisco to Nettleton and other points, where they are manufactured. The tap line receives from the Frisco a division of 2 cents

per 100 pounds out of the rates on lumber and 1 cent per 100 pounds on logs and stave bolts. On merchandise and cottonseed a local charge is made by the tap line for the haul to the junction.

This tap line has not recognized itself as a common carrier under the act to regulate commerce to the extent of filing an annual report with the Commission. Until it has complied with the provisions of the act and we are more fully informed with respect to its operations we shall hold that it has not shown that it may lawfully receive divisions out of the through rate on the traffic of its proprietors and others affiliated in its ownership and operation.

DE QUEEN & EASTERN RAILROAD.

The stockholders of the Dierks Lumber & Coal Company own nine-tenths of the capital stock of the De Queen & Eastern Railroad Company, and the two companies have practically the same officers. The tap line was incorporated in 1900 and the two companies were in their origin one and the same investment, and have so continued to the present time, the railroad being built as a facility in the lumbering operations. The book value of the road is said to approximate \$600,000 and capital stock is outstanding to the amount of \$593,700. When the mill was opened, in 1902, about 8 miles of the track had been laid. As described on the record, the tap line consists of about 27 miles of main track connecting with the Kansas City Southern at De Queen, Ark., extending southeasterly to a point known as Locksburg, and thence northeasterly to its terminus at Dierks. There are also about 15 miles of logging spurs and sidings, and the tap line has steel sufficient for about 30 miles of logging spurs. The tap line claims to have four station buildings along its line, costing about \$1,000 each, with a building used as its general office at De Queen. It also has track scales for weighing carload shipments and shops for repairing its equipment. There are 5 locomotives, 3 box cars, 74 flat cars, and 20 other cars, and in addition 2 log loaders. The tap line has 5 station agents, 1 train crew, and a number of track and shop men. It is said that none of its employees work for the lumber company. But the salaries paid by the tap line to its officials, who are also officials of the lumber company, aggregate \$650 per month.

The yellow-pine sawmill of the controlling company was formerly located at De Queen, within one-quarter mile of the tracks of the Kansas City Southern, but it was destroyed by fire about a year previous to the hearing. The statement made of record is that the mill will be rebuilt when the condition of the lumber market improves. The proprietary company also has a small hardwood mill, which was shut down shortly after the burning of the yellow-pine mill. It

is said that there are also six independent sawmills along the line and five cotton gins. The capacity of these mills is not stated, but seems to be small. There are five towns or settlements along the line, having a population of three or four hundred each, with one or two stores; one is a county seat. The tap line carries passengers, mail, and express, its revenues from that traffic aggregating about \$7,000 for the fiscal year 1910. Its freight revenues for the same year aggregated \$46,603.76. The freight moved consisted of 49,217 tons of lumber and forest products and 5,301 tons of other commodities. The tonnage of lumber represented the shipments that had accumulated before the mill was burned together with about two months' supply of logs for the hardwood mill. At the time of the hearing very little lumber was left at the mill for movement.

When the mill was in operation the practice was for the tap line to load the logs on the logging spurs, making a charge of \$1.25 per car against the lumber company; the tap line set up an additional charge of \$6 per car for hauling the logs over the spurs to the junction with its main track, including the maintenance of the spurs; and without charge against the lumber company the tap line hauled the logs over its main track to the mill. It also switched the lumber from the mill to the trunk line, a distance of about a quarter of a mile. The trunk line allowed out of its rates on yellow-pine lumber the divisions varying from 2 to 6 cents per 100 pounds, the average allowance actually made approximating 4 cents. The rates from points on the tap line, however, are 2 cents higher than the rate of the trunk line from the junction point, so that the net allowance runs up to 4 cents or less, the average net allowance being about 2 cents. No arbitrary is added to the junction point rate to make the rates from points on the tap line on hardwood lumber.

We are not advised whether the mill has been rebuilt and is again in operation. But if so, no division should be made on its products in excess of a reasonable switching charge, which we fix at \$1.50 per car.

CENTRAL RAILWAY OF ARKANSAS.

The Central Railway Company of Arkansas was incorporated in January, 1906, with a capital stock of \$2,600,000. Its charter describes a line 130 miles in length terminating at or near Hot Springs, Ark.; but as actually completed in 1907 it terminates at a point known as Brizi, Ark., about 13 miles from its other terminus at Ola, where it connects with the Rock Island. Only 10 per cent of the authorized capital is outstanding, that amount having been issued to the Fort Smith Lumber Company, which furnished the funds for building the track and purchasing the equipment, and by

which the stock was transferred, apparently as a dividend, to its own stockholders. The mill of the lumber company is at Plainview, on the tap line 7 miles from its junction with the Rock Island. The lumber company has an unincorporated logging track extending into its timber from a point intermediate between the mill and the junction point, but it has no engines or cars. The tap line has 5 locomotives, a combination passenger car, 3 box cars, and 16 flat cars. It also has three train crews, a number of track men, and a station agent at the mill point, Plainview, where there is a station building.

The logs are hauled by the tap line to the mill, an average distance of from 7 to 10 miles, at a charge of 50 cents per 1,000 feet, log scale, set up against the lumber company. The tap line also moves the lumber from the mill to Ola, a distance of 7 miles, and receives from the Rock Island a division of from $3\frac{3}{4}$ cents to 4 cents per 100 pounds.

It is claimed that there are three independent sawmills on the tap line and five or six other mills in that vicinity which haul their lumber to the tap line for shipment. But it appears that the aggregate lumber shipments furnished by others than the Fort Smith Lumber Company does not exceed 80 carloads per annum. All of these independent mills receive their logs by dray and their capacity is undoubtedly small. The report to the Commission for the fiscal year 1910 states the movement of forest products as 58,108 tons, substantially all of which seems to have been supplied by the proprietary company. It is stated that 40 per cent of the miscellaneous freight, amounting in the same year to 17,360 tons, was supplied by the lumber company. Only 1,558 tons of this miscellaneous traffic moved outbound. The junction point, Ola, is a town of about 1,000 people. Plainview seems to be a company town, having a population of about 1,500; and has been built since the opening of the mill and construction of the tap line. It is said to have two banks and six general stores. The tap line carries passengers, its revenue from that traffic aggregating \$3,654.70 for the year 1910, in addition to which it received \$644.31 for the carriage of mail and express matter. It had a net surplus on June 30, 1910, of \$2,650.60, resulting from its operations for previous years, there being a slight deficit for that year.

In this case we fix a maximum of $1\frac{1}{2}$ cents as the division of this tap line out of the rate on the products of the mill of the controlling company.

LOUISIANA & PINE BLUFF RAILWAY.

The Louisiana & Pine Bluff Railway Company is owned by the Union Sawmill Company, which itself is subsidiary to and owned by the Frost-Johnson Lumber Company. The three companies are one in interest. The facts are somewhat involved, but it will be well to state in some detail the history of the whole investment.

The Union Sawmill Company was incorporated in December, 1902, and acquired a large body of timber lying in southern Arkansas and across the line in Louisiana. It opened a sawmill at Huttig, Ark., and as a facility for the lumbering operations the Little Rock & Monroe Railway Company was incorporated, and 44 miles of track were constructed, extending from a connection with the El Dorado & Bastrop division of the Iron Mountain at Felsenthal to Monroe, passing through Huttig.

Immediately after the completion of this line, in the spring of 1905, it was sold to the Iron Mountain for about \$580,000 in cash, the right being reserved to the sawmill company, in a contract with the Iron Mountain, to operate its logging trains over the Little Rock & Monroe, the El Dorado & Bastrop, and Farmerville & Southern, being subsidiary lines of the Iron Mountain system, at a trackage charge of 35 cents per train-mile. At about this time, and apparently pursuant to a suggestion by the Iron Mountain officials, the sawmill company acquired extensive additional holdings of timber land valued at more than \$1,000,000. The contract heretofore referred to required the sawmill company and C. D. Johnson individually to organize a railroad corporation for the construction of a new line northerly from Huttig, to reach the timber in that direction and make it available for manufacture at the mill at Huttig. The provision in the contract was that the proposed railroad should be constructed and incorporated in such manner as to justify the publication of joint rates and the payment to it of allowances. In accordance with this agreement the Louisiana & Pine Bluff Railway Company was incorporated in March, 1905, with a capital stock of \$300,000, which was issued to practically the same persons that owned the Union Sawmill Company. The so-called terminals in the vicinity of the mill at Huttig, as well as the locomotives, cars, and other equipment that had been used on the Little Rock & Monroe previous to its sale to the Iron Mountain, were turned over to the tap line by the sawmill company in exchange for stock, which stock is still held by the sawmill company. This, in brief, is the story of the investment.

The Louisiana & Pine Bluff, as described on the record, has a main track 3 miles in length connecting with the Farmerville & Southern and Little Rock & Monroe divisions of the Iron Mountain at Huttig, and extending to Dollar Junction, where it meets the El Dorado & Bastrop division of the same system. There is also about 5 miles of track beyond Dollar Junction which was not yet completed for operation at the date of the hearing. From Huttig a track nearly 22 miles in length extends westward in a general way parallel to the Iron Mountain. This track was not included as part of the incorporated road until shortly prior to the hearing, as we shall hereinafter

state. We shall also refer again to the logging tracks, aggregating 75 miles in length, some of which are included as part of the incorporated line, while others are not. A track or branch about 3 miles in length, extending from Felsenthal to the river, was reserved when the Little Rock & Monroe was sold to the Iron Mountain, and was afterwards conveyed by the lumber company to the Louisiana & Pine Bluff. It was used for hauling logs from the river, and when the lumber company ceased getting logs from that source the track was abandoned and taken up. The equipment of the tap line consists of 12 locomotives, 1 combination passenger car, 1 caboose, 31 box cars, 36 flat cars, 22 coal and other cars, and 152 logging cars.

The track 22 miles in length from Huttig to El Dorado & Bastrop Junction, which has been referred to above, was constructed by the tap line, but until a year and a half before the hearing it was operated by the Huttig Logging Company, owned by the Frost-Johnson interests. The annual report for 1911 does not include this track as part of the tap line, but it is distinctly so included on the record. Nothing was paid by the logging company or the Union Sawmill Company to the tap line for the use of the tracks. Connecting with the tap line at various points are logging branches, one of which is 7 miles in length and another 21 miles long. These are referred to on the record as main logging stems; and connecting with them are logging spurs which are built by the logging company, the necessary steel being loaned by the tap line without charge. These spurs are operated by the logging company, which uses locomotives and cars belonging to the tap line, no rental being paid, although the locomotives are kept in repair by the tap line at its own cost.

The logging company loads the cars in the timber and moves them, with the engines borrowed from the tap line, to the main track. The cars are taken the rest of the way to the mill by the tap line, no charge being made against the lumber company or the logging company for the movement, although the trainmen employed by the tap line do the unloading.

The mill of the lumber company, as heretofore stated, is at Huttig and is directly accessible to the Iron Mountain. The plant covers about 160 acres. The lumber could be taken by the Iron Mountain directly from the mill; but as a matter of fact it is moved by the tap line for a distance of 3 miles to Dollar Junction, and there delivered to the Iron Mountain, which allows 5 cents per 100 pounds out of its rates on yellow-pine lumber to all destinations. The rates on hardwood lumber are about 2 cents lower than the rates on yellow pine, and on such traffic the Iron Mountain allows 3 cents per 100 pounds. On all lumber the rate of the Iron Mountain from the junction point is published as a joint rate from points on the tap line.

The Wisconsin Lumber Company, which is affiliated with the International Harvester Company, has a large hardwood sawmill on the tracks of the tap line at Huttig. It obtains a portion of its hardwood logs from the Union Sawmill Company, at a price including their delivery at the mill. Such logs are hauled to the mill in the same manner as the yellow-pine logs moving to the Union Sawmill. The hardwood logs which the Wisconsin Lumber Company obtains from the lands owned by others are also brought to the mill without charge, the service being performed by the logging company and the tap line in the manner already described. The manufactured lumber is moved from the Wisconsin Lumber Company's mill to Dollar Junction by the tap line, which receives the divisions heretofore stated. The annual report to the Commission for the fiscal year ending June 30, 1910, shows no tonnage other than forest products moving outbound and coal coming inbound. The coal was consumed entirely by the sawmill company, the logging company, and the tap line itself, and aggregated 3,835 tons. Out of the total of 317,473 tons of logs and lumber handled during the same year, about 7,900 tons was manufactured by others than the sawmill company from logs cut on the lands of that company. The tap line has joint rates with the Iron Mountain on coal as well as lumber, but not on merchandise or class traffic. The record indicates that no charge is made for hauling logs that are cut by farmers or others and manufactured at the mills on the tap line. Although the tap line claims to run "two passenger trains daily" between Dollar Junction and Huttig, it has but one combination coach, and its receipts from passengers for the year 1910 amounted to only \$587.24. Its mail revenue amounted to \$101.31. Its operating revenues for that year aggregated \$78,714.93, and this amount was substantially less than its operating expenses. On June 30, 1910, it had an accumulated deficit of more than \$85,000, which we assume has been taken care of in some way by the lumber company or its owners.

This is a typical instance of a mere manipulation of its facilities in such a way as to give the tap line the appearance of performing a service as a basis for an allowance out of the rate. Indeed, it was agreed, as heretofore stated, that the tap line should be constructed in such a manner as to justify allowances. A glance at the map will show how this was done. The Iron Mountain reaches the mill with its own rails, and is, therefore, in a position to serve the mill directly without making a concession to the lumber company out of the rate. The lumber company, however, has constructed a track of its own 3 miles in length to the Iron Mountain rails, and in compensation for its service in switching its lumber over that track it receives allowances of 5 cents a hundred pounds, or from \$20 to \$30 a car. We have already said that the extension of the trunk-line lum-

ber rate through the mill point to the tree stump on a tap line is discriminatory unless the same rate adjustment is in effect on the trunk line's own rails. The only service of transportation, therefore, that this tap line can be said to perform for the lumber company that owns it is the switching of the product of its mill to the trunk line, and this the latter is equipped to do upon its own rails. Under these circumstances we regard the arrangement as a mere device for the payment of allowances, which we hold to be unlawful.

We have already pointed out that a tap line claiming to be a common carrier can not render service for others without charge. It follows, if that is its status, that its practice of hauling hardwood logs without charge to the mill of the Wisconsin Lumber Company is unlawful. The divisions received by it for switching products of the Wisconsin Lumber Company's mill to the Iron Mountain are also unlawful.

MANSFIELD RAILWAY.

The Mansfield Railway & Transportation Company was incorporated as long ago as 1881, by the citizens of Mansfield, who built 2 miles of track from the town to a connection with the Texas & Pacific, at a point known as Mansfield Junction. Within the past 10 years this track and the equipment then in use was acquired by E. A. Frost and others, through purchase, for the sum of \$12,500, of the entire capital stock of the railway company. At about the same time a large body of timber land was purchased, lying west of the line of the Texas & Pacific, and a sawmill was erected at a point near Mansfield, known as Oak Hill. The timber and the mill were held and operated by a corporation, owned by Frost and his associates, known as the De Soto Land & Lumber Company, which also held the stock of the Mansfield Railway. Some 6 or 8 miles of logging roads were constructed from a connection with the incorporated line into the timber. There is some obscurity in the record, but our understanding is that the Frost-Johnson Lumber Company was later organized by the same interests, and took over the property and business of the De Soto Company. The additional tracks that had been constructed by the Frost interests, however, were transferred in 1908 to their tap line corporation, the Mansfield Railway & Transportation Company. The lumber company reserved to itself the free privilege of operating logging trains between the timber and the mill; the value of this reservation was not reflected in the purchase price, which fully covered the value of the property transferred, as the record clearly indicates. The tap line has issued and outstanding capital stock to the amount of \$77,300, all of which is held by the stockholders of the Frost-Johnson Lumber Company; and it is indebted to the lumber company in the sum of \$216,806.97.

The two companies are identical in interest. There is a subsidiary corporation of the Frost-Johnson Company that performs the entire logging service. It is owned absolutely by the lumber company, which has assigned to it the trackage privilege over the tap line; and we shall refer to it hereinafter simply as the logging company.

The tap line as described on the record now consists of about 16 miles of track commencing at the town of Mansfield and terminating at a logging camp in the woods known as Hunter. In addition to the original connection with the Texas & Pacific at Mansfield Junction the tap line joins the Kansas City Southern, which subsequently built through this section, at a point about one and one-half miles east of Mansfield. The tap line has one locomotive, a passenger coach, and one box car; the logging cars are owned by the logging company. In addition to the incorporated road there are in the aggregate nearly 25 miles of unincorporated logging tracks in the woods.

The tap line does not haul the logs to the mill, which, as heretofore stated, is at Oak Hill, about three-fourths of a mile from the junction with the Kansas City Southern and two and one-half miles from the point of interchange with the Texas & Pacific. The mill is within 300 feet of the right of way of the Kansas City Southern, with which it was formerly connected by a spur track that was abandoned and later taken up. The logs are moved to the mill by the logging company under the reserved trackage right already referred to. The service performed by the tap line for the proprietary company consists in switching the empty and loaded cars for lumber shipments between the mill and the tracks of the trunk lines, a distance of three-fourths of a mile or two and one-half miles, respectively. The tap line, however, bears the expense of maintaining the incorporated tracks extending into the woods over which the logging trains are operated.

There are no other yellow-pine sawmills served by the tap line. But there is a hardwood mill adjacent to the mill of the Frost-Johnson Company, which apparently obtains a substantial portion of its logs from the Frost-Johnson Company or its subsidiary logging company, the price paid including delivery at the hardwood mill. Such logs are hauled to the mill by the logging company under its trackage right in the same manner that the logs are hauled to the Frost-Johnson mill. The hardwood mill also obtains some logs along the Texas & Pacific, which are switched by the tap line to the mill at a charge of \$2.50 a car or less. The tap line has joint rates on hardwood as well as yellow-pine lumber.

A good deal of outside traffic is handled over the original two miles of line from Mansfield to Mansfield Junction, but there is practically no traffic in which the proprietary company is not inter-

ested over the remainder of the track. Hunter, at the western end of the line, is a logging camp, and there are very few settlers along the line who are not employees of the lumber company or the subsidiary logging company. During the fiscal year ending June 30, 1910, 28,596 tons of lumber were handled, of which 91.4 per cent was supplied by the Frost-Johnson Company. There was 16,539 tons of miscellaneous freight, almost all of which moved over the line between Mansfield and Mansfield Junction, and a considerable proportion of which was handled for the controlling interests or their employees. The tap line operates a daily train in each direction on regular schedule and handles passengers, mail, and express; but its revenues from passenger train operation during the year 1910 aggregated only \$1,209.76, its freight revenue being \$25,617.19.

As stated the spur track of the Kansas City Southern, about 300 feet long, which formerly went directly into this mill, was torn out; the switching is now done over a track of the tap line three-fourths of a mile long. This arrangement being effected, the Kansas City Southern thereupon undertook to pay the tap line allowances of 1 to 4 cents per 100. We hold this to be a mere manipulation of the situation in order to establish a relation that is unlawful. The tap line also crosses the right of way of the Texas & Pacific within a short distance from the mill, but the lumber is switched by the tap line back toward Mansfield and then to the junction with that line, a distance of about $2\frac{1}{2}$ miles; the tap line receives from the Texas & Pacific 1 to 4 cents per 100 pounds. In this case we regard any allowance as unlawful.

GULF & SABINE RIVER RAILROAD.

We gather from the record that the Gulf & Sabine River Railroad Company is controlled, through the ownership of its capital stock and bonds, by the Gulf Lumber Company, which is a subsidiary corporation or closely allied in interest with the Chicago Lumber & Coal Company, which has mills elsewhere and acts as sales agent for the Gulf Lumber Company.

The Gulf & Sabine River Railroad Company was incorporated in 1906 and is capitalized at \$100,000 with a bonded indebtedness of \$300,000. It consists of two separate tap lines, not physically connected, one known as the Stables division, connecting with the Kansas City Southern at Stables and extending about $8\frac{1}{2}$ miles into the timber with logging spurs aggregating about 8 miles in length; the other known as the Fullerton division, comprising 10 miles of track, connecting with the rails of the Santa Fe at Nitram and extending to and beyond Fullerton, La. Since the hearing we are advised that active progress has been made on an extension of the

Fullerton division to Leesville, a point not far from Stables, where a connection apparently will be effected with the Kansas City Southern. The Lake Charles & Northern, a part of the Southern Pacific system, also connects with the Fullerton division at Nitram by means of trackage rights over the rails of the Santa Fe. In addition to the tracks already described, the lumber company has many miles of logging spurs which connect with the tap line at various points and which the lumber company maintains and operates, using for that purpose one or more locomotives leased from the tap line at a charge of \$10 per day. The entire equipment of the Gulf & Sabine consists of 7 locomotives, 2 passenger cars, 95 logging cars, and 10 other cars. The lumber company has no rolling stock of its own.

The so-called Stables division is purely a logging road and has no outside traffic. Curiously enough there is no mention on the record of the mill on this portion of the tap line, but we understand from other sources that the controlling interests have two mills at Stables, one of which is within 150 yards of and is reached by a spur track from the Kansas City Southern. While the record is deficient in this respect, it is clearly indicated that on the Stables division, its only service is in the movement of logs to the mill and the switching of lumber from one of the mills to the Kansas City Southern. It charges the lumber company for the log movement \$2.50 per car, and receives from the Kansas City Southern divisions of from three-fourths of a cent to 1 cent per 100 pounds. We hold this to be unlawful, and that no allowance may be paid to the tap line or to the controlling company on products of its mills on this division.

The construction of the tracks known as the Fullerton division was begun in 1907, before the mill of the lumber company was opened for operation at Fullerton, and before the line of the Santa Fe was built into Nitram. The tracks on this line are of unusually substantial construction, being laid with 56 and 60 pound rail, well ballasted, with a maximum grade of six-tenths of 1 per cent. It has a round-house, track scale, and telephone and telegraph wires for dispatching trains and other purposes. The record indicates that the Santa Fe offered to build into Fullerton, but the lumber company preferred to construct a tap line. Two trains are operated daily in each direction on a regular schedule for the transportation of passengers, express matter, and the mails, as well as for the transportation of lumber between the mill at Fullerton and the connection with the trunk lines at Nitram. The mill has a capacity of from 35 to 50 carloads of lumber per day, and its actual shipments are said to average 25 carloads. In a broad sense Fullerton is a company town, with a population of about 1,800 and a number of stores. The supplies needed

for a community of that size furnish more or less traffic for the tap line; its miscellaneous freight during the year 1910 amounted to nearly 10,000 tons. The passenger earnings of that year were \$3,809.25, and the express and mail revenues amounted to \$956.48. The lumber and logs of the controlling interests, however, amounted to 370,164 tons during the same year, or in excess of 90 per cent of the total traffic. It receives on this lumber an allowance from the Lake Charles & Northern of 25 per cent of the proportions accruing up to Lake Charles, La., or from 1 to 4 cents per 100 pounds. No allowance is made by the Santa Fe. The tap line also charges the lumber company a flat rate of \$2.50 per car for the movement of logs from the connection between the logging spurs and the incorporated track to the mill. There are also said to be several small mills in the territory traversed by the Gulf & Sabine River Railroad, which cut hardwood lumber chiefly from logs taken from lands of the Gulf Lumber Company.

The total operating revenue of the Gulf & Sabine in the year 1910 was \$116,359.74, its operating expenses aggregating \$76,067.43, leaving a net operating revenue of \$40,292.31. While it has paid no dividends on its capital stock it had an accumulated surplus on June 30, 1910, of \$34,969.16.

On this division of the tap line we think any allowance out of the rate in excess of 1 cent a 100 pounds on the products of the mill of the controlling company is unlawful. We fix that as a maximum.

LOUISIANA & PACIFIC RAILWAY.

The Louisiana & Pacific Railway Company was incorporated June 6, 1904, with an authorized capital stock of \$200,000, of which only \$51,000 has been issued. It is controlled by what is referred to on the record as the R. A. Long interests, 70 per cent of its capital stock being held by R. A. Long and the rest apparently by his agents and associates. The record indicates that Long owns the same proportion of the capital stock of the Hudson River Lumber Company, King-Ryder Lumber Company, Longville Lumber Company, and the Calcasieu Long Leaf Lumber Company, all of which have saw-mills on the Louisiana & Pacific. The Long-Bell Lumber Company, which is a part of the same general interest, does not manufacture lumber, but markets the output of these mills. Only \$30,000 of the capital stock of the tap line was issued for cash, and the balance was subsequently distributed to its stockholders as a stock dividend. It has outstanding bonds to the amount of \$582,200, which were issued for the purpose of taking up notes payable to the various lumber companies, and covering purchases of track and equipment. All of

the tracks of the Louisiana & Pacific, as hereinafter described, were originally constructed as private logging roads by the individual lumber companies.

The Lake Charles & Northern Railroad, which is owned by the Southern Pacific, extends from De Ridder, La., southward for a distance of about 46 miles to Lake Charles. It was originally built by the R. A. Long interests as part of the Louisiana & Pacific, and was sold to the Southern Pacific, which thereupon incorporated the Lake Charles & Northern to operate the property. In the sale of the property to the Southern Pacific, however, the R. A. Long interests reserved to the Louisiana & Pacific the right of jointly operating the track between Lake Charles and De Ridder. The Louisiana & Pacific pays the Lake Charles & Northern 25 cents per train-mile for the trains that it operates over that track, and also bears a certain proportion of the station expenses; the payments aggregated for the fiscal year 1910 approximately \$7,000. The two companies, as the record indicates, enjoy equal rights over the track, and in view of the price received by the R. A. Long interests from the Southern Pacific the trackage arrangement is obviously a most advantageous one.

The Louisiana & Pacific is a peculiar property. There are five separate branches or tracks not directly connected with each other, but all joining at different points the track conveyed to the Lake Charles & Northern. The five tracks may be described as follows: (1) A track connecting with the Lake Charles & Northern at De Ridder Junction, and extending 8 miles to Bundicks, which is apparently a logging camp with a company store. The mill of the Hudson River Lumber Company, in whose interest this track is operated, is at De Ridder, being within a few hundred feet of the rails of the trunk lines. (2) At Lilly Junction, a second section of the track of the tap line connects with the Lake Charles & Northern, extending therefrom about $7\frac{1}{2}$ miles to a point in the woods known as Walla, where the King-Ryder Lumber Company has a commissary, and there is a small independent yellow-pine mill, owned by the Bundick Creek Lumber Company. The mill of the King-Ryder Company is at Bon Ami, on the track jointly operated by the tap line and the Lake Charles & Northern. This is a town of 2,000 people, but apparently has no other industries. (3) Two miles of incorporated track of the Louisiana & Pacific connect with the Lake Charles & Northern track at Longville, a town of 2,000 population, where the Longville Lumber Company has its mill, and a store. There are also several independent stores. (4) There are 9 miles of track connecting with the Lake Charles & Northern at Fayette, and extending to Camp Curtis, a

settlement of 200 people, where the Calcasieu Long Leaf Lumber Company has a company store, its mill being at Lake Charles. (5) A track 1 mile in length described on the record as connecting with the Lake Charles & Northern at Bridge Junction and running to Lake Charles station. Through its operating rights over the Lake Charles & Northern the tap line connects with the Kansas City Southern and the Santa Fe at De Ridder, with the Frisco at Fulton, and with the Southern Pacific, Iron Mountain and Kansas City Southern, at Lake Charles. The equipment of the Louisiana & Pacific consists of 22 locomotives, 6 cabooses, 41 freight cars, and 270 logging cars. It also owns a private car which is used in traveling around the country by its officers who hold free transportation, and who are connected with the lumber companies. The lumber companies have many miles of unincorporated logging tracks connecting with the several sections of the Louisiana & Pacific at various points. There are a number of other towns or settlements named on the record, which it is unnecessary to mention; and there is a second small independent mill, owned by the Brown Lumber Company, and located at Bannister, on the Lake Charles & Northern.

The logs are loaded by the lumber companies and switched by them over the logging spurs to the point of connection with the incorporated line. The cars are then hauled by the tap line to the mill, a distance on the average of about 30 miles, as is stated of record. No charge is made by the tap line against the lumber companies for the log movement. The tap line switches the carloads of lumber a distance of three-fourths of a mile from the mill at Lake Charles to the Southern Pacific; or a distance of a few hundred feet from the De Ridder mill to the trunk lines. It moves lumber for a distance of 18 miles from the Lake Charles mill to the Frisco; the movement from the mill at Bon Ami to the Southern Pacific at Lake Charles is 40 miles; and the lumber movement from the Longville mill to the Southern Pacific at Lake Charles is 24 miles. The average haul of the tap line on lumber movements of the controlling companies is said to be nearly 20 miles. The steel for these tracks is apparently supplied by the tap line without charge. There are written agreements under which 50 per cent of the lumber tonnage must be routed over the Frisco and 40 per cent by the Southern Pacific; but the record indicates that these obligations are not rigidly adhered to and more than 10 per cent is delivered to the other trunk lines. The total movement of lumber for the fiscal year 1910 was 243,122 tons, and the merchandise and other commodities aggregated 8,819 tons. As much as 98 per cent of the entire tonnage was supplied by the controlling interests. A few passengers are carried, the receipts from

that source for the year 1910 being \$473.77. A logging train runs daily on each of the branches, and there is one "mixed train," loaded chiefly with logs and lumber, moving over the track between Lake Charles and De Ridder.

The allowances paid by the trunk lines range from $1\frac{1}{2}$ to $5\frac{1}{2}$ cents per 100 pounds, out of their earnings under the group-lumber rate.

The annual report to the Commission for the year ending June 30, 1910, shows an operating revenue of \$220,985.94, with operating expenses amounting to \$145,433.69. There was an accumulated surplus on that date of \$73,581.07.

In this case we have another instance of a service performed for a lumber company by a tap line claiming to be a common carrier for which no charge is made, namely, the service of hauling the logs to the several mills. For the switching service of a few hundred feet from the mill at De Ridder to the trunk lines, and three-fourths of a mile from the mill at Lake Charles to the Southern Pacific, allowances are made out of the rate of from $1\frac{1}{2}$ to $5\frac{1}{2}$ cents. There are other important facts of record with respect to this tap line which we have not thought necessary to include in this statement. We regard the whole arrangement as indefensible and unlawful, and see no grounds upon which any allowance may lawfully be made.

SIBLEY, LAKE BISTENEAU & SOUTHERN RAILWAY.

The Sibley, Lake Bisteneau & Southern Railway Company and the Globe Lumber Company belong to what is referred to on the record as the R. A. Long interests, a majority of the stock of both companies being owned by R. A. Long. The tap line, with the Louisiana & Pacific and the Woodworth & Louisiana Central, forms what is known as the Shreveport, Alexandria & Southwestern system.

The Sibley, Lake Bisteneau & Southern connects at Sibley, La., with the Vicksburg, Shreveport & Pacific and the Louisiana & Arkansas railroads, and extends southward for about 31 miles through Webster and Bienville parishes for about 28 miles, terminating 3 miles beyond a point known as Camp Long. It apparently parallels the Louisiana & Arkansas for a considerable portion of its length. South of Camp Long there are extensive unincorporated logging tracks. The entire road, which is laid with 40 and 60 pound rails, was originally built as a private logging road, but was incorporated in 1900, with a capital stock of \$100,000, all of which was issued to the lumber company in part payment for the property then acquired the valuation of which was fixed at \$211,000. The tap line still owes the lumber company about \$100,000. Its equipment consists of 6 locomotives, 2 passenger cars, 7 freight cars, and 106 logging cars. It will be observed, however, that three of the locomotives and all of

the freight and logging cars are leased to and used by the lumber company.

The mill is at Yellow Pine, a company town with a population of 1,200, less than 5 miles south of the junction with the trunk lines. The only other towns on the line are Sibley, the junction point, a place of about 800, and Ringgold, which is about 16 miles south of Sibley, and seems to be 5 miles from the Louisiana & Arkansas Railroad, having a population of more than 1,000, with a bank, several stores, and an independent sawmill, cotton gin, etc. It is claimed that the country tributary to the tap line is being settled; there are a number of very old farms. There are about 117,000 acres of timber reached by the tap line which is owned and controlled by the lumber company. The tap line claims to have four independent lumber shippers, the principal one shipping about 20,000 feet a day. This mill, however, is 3 miles from the tap line and its logs are hauled to the mill and its lumber to the tap line by teams.

The record indicates that about 70 per cent of its freight revenue accrued on traffic supplied by the proprietary company. During that year it handled 2,384 tons of agricultural products, moving out-bound, and 1,692 tons of such freight, moving in, with more than 4,000 tons of other freight. Of the whole movement 43,899 tons was supplied by the proprietary company, and 9,762 tons was handled for others. The tap line apparently runs one "mixed" train daily in each direction on which passengers are carried. Its revenue from that source during the year 1910 aggregated \$3,112.16. The freight revenue for the same period amounted to \$46,646.08. The operating expenses for that year exceeded \$60,000, leaving a deficit after the payment of taxes and interest of more than \$20,000. But there was an accumulated surplus from previous years of more than \$80,000, so that on June 30, 1910, its net surplus was \$53,626.70.

The lumber company loads the logs on the cars furnished to it by the tap line and hauls them to the junction of the logging tracks with the incorporated line. They are then hauled by the tap line to the mill, a charge of \$2.75 being made for the movement, when the logs reach the tap line south of Ringgold, and \$2.50 per car when taken by it from points north thereof. The logs coming from north of Ringgold are hauled to the tap line with teams, being purchased from small independent producers. With the exception of a few hardwood logs shipped for export no logs have been handled by the tap line for outsiders. The tap line moves the empty cars furnished by the trunk line to the mill and switches the loaded cars back to the junction, a distance of less than 5 miles. It receives out of the rates allowances from the trunk lines ranging from $1\frac{1}{2}$ to $4\frac{1}{2}$ cents per 100 pounds. It at one time received as much as 7 cents per 100 pounds.

In this case the allowance paid by the connecting trunk lines on the products of the proprietary mill may not lawfully exceed 1 cent per 100 pounds.

ROOSEVELT & WESTERN RAILROAD.

The Roosevelt & Western Railroad is owned by J. B. Schuh and extends from a connection with the Iron Mountain at Roosevelt, La., for 8 miles into the timber. It has 1 locomotive, 2 box cars, 2 slab cars, and 10 logging cars. None of the equipment has safety devices except the locomotive, which has air brakes. The tap line was incorporated in 1909, when the construction was commenced, and it has capital outstanding to the amount of \$15,000. The track is laid with old rails leased from the Iron Mountain for a rental of 6 per cent of the valuation.

The mill is at a point known as Lynchville, about one and three-quarter miles west of the junction with the Iron Mountain, and is operated in the name of the J. B. Schuh Lumber Company, which is not incorporated. There are no other mills or industries on the line. The lumber company holds about 96,000 acres of timber rights and there are three farms, or plantations, along the line. At the date of the hearing the tap line had been in operation only a few months and it had handled in that time about 6,000 tons of lumber for its owners. It claims to have handled 500 tons for outsiders. It does not run trains with any regularity and carries neither passengers, mail, nor express matter. It moves the logs to the mill at a charge of 1 cent per 100 pounds against the lumber company. It switches the empty and loaded cars for lumber movements for a distance of less than two miles in each direction between the mill and trunk line. Its allowance out of the published rate of the Iron Mountain is 2 cents per 100 pounds.

As the facts are thus disclosed the Roosevelt & Western clearly comes within the class of cases disposed of in our original report, and is not a common carrier with respect to the services it performs for the proprietary interests or on the product of their mills. But under the ruling in the original report the lumber rate of the Iron Mountain extends from the mill, and upon arranging with the lumber company to perform the service of moving cars to and from its line the Iron Mountain is entitled to make it a reasonable allowance out of the rate under section 15 of the act.

TIOGA & SOUTHEASTERN RAILWAY.

The Tioga & Southeastern Railway Company was incorporated in 1905, and its entire capital stock, amounting to \$50,000, is held by the stockholders of the Lee Lumber Company; the two companies

have the same officers. Ten miles of the track was originally constructed by the Louis Werner Sawmill Company, from which it was acquired by the present owners in 1905, with the purchase of the sawmill at Tioga, La.

The tap line extends from a connection with the Iron Mountain at Tioga through Ems, which is on a branch line of the Louisiana Railway & Navigation Company, to Violet, a distance of 15 miles. Beyond that point the lumber company has about five miles of unincorporated logging tracks. The tap line also has several miles of spur tracks, some of which are used for logging operations in the woods. The equipment consists of 5 locomotives and 52 log cars. Two of the locomotives are leased to the lumber company for a rental of \$10 per day.

The logs are loaded on the spurs and hauled by the lumber company to the junction of the unincorporated track with the tap line, from which point the tap line hauls the logs to the mill. For the service on the logs the tap line charges \$5 per car where the manufactured lumber moves to a point where there are no through rates in effect with the trunk line. Where there are through rates the \$5 charge is not made, but the divison allowed by the trunk line, which averages \$20 per car on the lumber, is accepted by the tap line as covering the movement of the logs to the mill. Both the sawmill and the planing mill are reached directly by the Iron Mountain, so that the tap line performs no service in the movement of lumber over that route. About 10 per cent of the output of the mill is forwarded over the Louisiana Railway & Navigation Company, a distance of 9 miles.

The tap line makes annual reports to the Commission. For the fiscal year ending June 30, 1910, its freight tonnage aggregated 44,782 tons, of which all but 464 tons was lumber, logs, and staves. About 99 per cent of the entire traffic was furnished by the Lee Lumber Company. No dividends have been paid, but there was an accumulated surplus on June 30, 1910, of \$99,194.61. The intention is to devote the surplus, as is asserted, to extending the road toward the Mississippi River and toward a connection with the Texas & Pacific, the country to be traversed being heavily wooded and the lumber company having an interest in the timber.

The service performed for the Lee Lumber Company by its tap line is a plant service and not a service of transportation. Any allowance by the Iron Mountain, which itself moves the lumber from the mill, would be unlawful. There is no justification for an extension by the Louisiana Railway & Navigation Company of the group rate to the mill and an allowance out of that rate to the tap line for the back haul from the mill to the junction at Ems.

LOUISIANA CENTRAL RAILROAD.

The Louisiana Central Railroad Company was incorporated in 1904, and its entire capital stock, amounting to \$250,000, was issued to and is now held by the stockholders of the W. R. Pickering Lumber Company, to which it is indebted for loans amounting to nearly \$75,000. The two corporations are not only identical in interest but have the same officers.

The tap line consists of two separate pieces of track, about 20 miles apart. One is designated as the northern division; it connects with the Kansas City Southern at Barham, La., where the lumber company has a mill, and extends in a westwardly direction for about 9.5 miles into the timber, terminating at a point known as Bayou Toro. This track was originally constructed by the lumber company as a private logging road, and the title was transferred for stock of the railroad corporation when later formed. The lumber company has about 10 miles of unincorporated spurs connecting with this track. The lumber produced at the Barham mill is loaded on cars standing on the tracks of the Kansas City Southern, and the only service performed by the tap line is the movement of the logs to the mill.

The so-called southern division serves two mills of the lumber company, one at the junction of the tap line with the Kansas City Southern at Pickering, La., and the other about one-half mile from the junction of the tap line with the rails of the Santa Fe at Cravens. The Lake Charles & Northern uses the line of the Santa Fe through Cravens under trackage rights. The track of the Louisiana Central from Pickering to Cravens is about 19 miles in length and extends beyond the Santa Fe for a distance of about 10 miles. There are a number of logging spurs connecting with the southern division and operated by the tap line. The main track was in part constructed by the lumber company and turned over to the tap line when incorporated.

The greater portion of the lumber manufactured at the Cravens mill is hauled by the tap line for a distance of about 19 miles to Pickering and delivered to the Kansas City Southern. A few carloads from that mill move out over the Lake Charles & Northern or the Santa Fe, whose track is about one-half mile distant, and in such case the Lake Charles & Northern allows the tap line a switching charge of \$2.50 a car. Substantially the entire output of the mill at Pickering moves out over the Kansas City Southern, and the record indicates that 75 per cent of the tonnage at that mill is moved by the Kansas City Southern from the mill without the aid or intervention of the tap line.

The tap line has 10 locomotives, 1 combination passenger and baggage car, 4 freight cars, 1 caboose, 5 other cars, and 166 logging cars. It has station agents at Cravens, Pickering, and Barham, who are also employees of the lumber company. It employs about 60 trackmen, who work not only on its main tracks but on the logging spurs of the southern division. The tap line runs one train daily out of Barham, which is referred to on the record as a passenger train; but its passenger earnings are insignificant, having amounted to only \$83.64 in 1910. Apparently a single log train is also run with more or less regularity on the southern division. But on both divisions practically the only movement is logs and lumber of the Pickering Lumber Company. The total traffic for the year ending June 30, 1910, was 216,346 tons, of which 99 per cent was supplied by the controlling lumber company.

The Kansas City Southern allows a division of from three-fourths cent to 5½ cents per 100 pounds out of its rates on yellow-pine lumber, the maximum division being paid out of the rate of 24 cents to Kansas City. With the exception of the switching charge heretofore referred to, no divisions are accorded the tap line by the Lake Charles & Northern or the Santa Fe; and the result seems to be that those lines get scarcely any of the traffic. The lumber company is charged \$1.25 per 1,000 feet, log measure, for the service performed by the tap line on the logging spurs. But no charge is made against the lumber company for the movement of the logs over the main tracks of the tap line to the several mills.

As heretofore stated, the lumber is taken from the mill at Barham, on the so-called northern division, by the trunk line itself, whose tracks apparently reach that mill; the service by the tap line of bringing the logs to the mill is purely a plant service, and any allowance by the Kansas City Southern, either to the tap line or to the lumber company, would be clearly unlawful.

There are two mills on the so-called southern division. From the mill at Pickering the Kansas City Southern itself moves the major portion of the lumber without aid by the tap line, the mill being within 1,000 feet of the Kansas City Southern tracks. We see no grounds upon which an allowance to the tap line may lawfully be made on the products of either of the mills, but an allowance may be made to the lumber company under section 15 on lumber delivered by it to the carriers at Cravens from the mill at that point. The mill at Cravens is one-half mile from the tracks of the Santa Fe, over which the Lake Charles & Northern has running rights.

NORTH LOUISIANA & GULF RAILROAD.

The stockholders, officers, and directors of the North Louisiana & Gulf Railroad Company bear the same relation to the Huie-Hodge

Lumber Company; and the two companies are one investment. The tap line is in two separate sections. One track connects with the Rock Island at Hodge, La., where the lumber company has a sawmill and planer, and extends westward for about 10 miles to a point known as Danville, where the lumber company has a hardwood mill. This track was originally operated as a private logging road and was taken over by the tap line, when incorporated, in January, 1906. Beyond Danville there are several miles of rails at present owned and operated as an unincorporated logging road by the lumber company, but which was formerly included as a part of the North Louisiana & Gulf. The tap line deeded this track back to the lumber company in exchange for the four miles of track that now composes the other section of the incorporated tap line. This track connects with the Louisiana & Northwest Railroad at a point known as Bienville, La., and runs eastward to a point in the woods known as Walsh; it was laid by another lumber company in 1907 and was acquired by the present owners in 1909, with the purchase of the sawmill at Bienville. We understand that since the hearing several miles of additional track have been laid from Walsh to Danville, thus connecting up the two parts of the incorporated tap line. The new track also serves to reach additional timber of the lumber company.

The tap line has 5 locomotives, 1 combination car, 6 box cars, 7 flat cars, and 70 logging cars. Two of the locomotives are used by the lumber company in hauling the logs over the unincorporated tracks to Danville, the rental paid being in the form of a charge of 25 cents per 1,000 feet on the logs handled. From Danville the tap line hauls the yellow-pine logs to the mill at Hodge without charge. The tap line also hauls rough hardwood from the mill at Danville to the planing mill at Hodge; and no charge is made for this service. Some of the hardwood lumber is shipped out without planing. On shipments from the mill or planer at Hodge a part of the service is performed by the tap line and a part by the Rock Island. The same conditions exist with respect to the movements of logs and lumber at the Bienville mill on the Louisiana & Northwest. That line allows a uniform division of 2 cents per 100 pounds, while the Rock Island pays from 1½ to 4 cents per 100 pounds. Joint rates were first established by the Rock Island in 1906 and by the Louisiana & Northwest in 1909.

The annual report for the year 1910 shows a total traffic of 40,228 tons, of which 1,145 tons were merchandise and supplies, and the remainder was forest products. One logging train is run daily in each direction, on which passengers are carried, the revenue from that source for the year 1910 being less than \$800, with revenues from mail

service amounting to about \$340. There are one or two small shippers of staves, bolts, and ties along the line; and mention is made on the record of the proposed establishment of a salt and crushed-rock plant, which it is hoped will ship two or three carloads a day. But the traffic of the tap line, in which the lumber company is not directly interested, is very small, and the service it performs is that of a mere plant facility of the lumber company.

Each of the mills on this line is within less than 1,000 feet of the tracks of the nearest trunk line. No allowance may therefore be made out of the rate on the products of either mill. On the products of the hardwood mill a division of 2 cents may be paid by each of the connecting trunk lines, except when again milled or planed at Hodge.

MONROE & SOUTHWESTERN RAILWAY.

The Monroe Lumber Company, predecessor of the Grayling Lumber Company in the ownership and operation of a yellow-pine saw-mill at Monroe, La., on the east bank of the Ouachita River and on the tracks of the Iron Mountain, built a private logging road from the opposite bank of the river into its timber. This track connects at West Monroe with the Vicksburg, Shreveport & Pacific. Subsequently, in 1904, the Monroe & Southwestern Railway Company was formed, with an authorized capitalization of \$1,000,000, of which \$172,000 was issued, and took over the track referred to, which is about 10 miles in length. The stockholders of the Grayling Lumber Company own the stock of the tap line, and the two companies are one and the same investment. The incorporated track includes also about 7 miles of spurs and sidings, in addition to which the lumber company has unincorporated logging spurs connecting with the tap line at various points, the steel in which belongs to the tap line. The tap line has 4 locomotives and 91 cars. The lumber company has the free use of one of the locomotives. The tap line runs two logging trains daily in each direction and claims to carry a few passengers, but its report to the Commission for the year 1910 shows no passenger revenues. For the year 1911 the revenue from that source amounted to \$334.35. About 99 per cent of the whole traffic, amounting to 99,338 tons, was supplied by the proprietary company. Its entire tonnage was forest products, with the exception of 484 tons of agricultural products and 69 tons of merchandise. It is claimed that four or five carloads of staves, bolts, and ties are moved each month for outsiders. A local rate is charged on all traffic except the lumber of the controlling company. This is true of the lumber manufactured at the hardwood mill of the Riverside Lumber Company, about 1 mile from the junction with the Vicksburg, Shreve-

port & Pacific. This mill receives its logs on the river and pays the tap line \$5 a car for switching its lumber to the trunk line.

As will be seen from the foregoing statement, the mill of the lumber company is served only by the tracks of the trunk line; its tap line terminates at the opposite bank of the stream. The service performed by the tap line therefore consists of moving the logs from the point of connection of the unincorporated spurs with its track to the west bank of the river. There is a cable stretched across the river which the lumber company operates and by means of which the logs are transferred from the cars on the tap line to the mill. The lumber is taken from the mill by the Iron Mountain, which allows out of its rates a division of 3 and 4 cents per 100 pounds. The Vicksburg, Shreveport & Pacific makes no rates in connection with the tap line, and no traffic of the controlling lumber company moves out over that line. In addition to the divisions received from the Iron Mountain the tap line charges the lumber company $1\frac{1}{2}$ cents per 100 pounds for the movement of the logs to the river.

The annual reports filed with the Commission indicate an accumulated surplus on June 30, 1910, of nearly \$25,000, which had actually been expended, however, on the improvement of the line.

This is clearly not a case in which the trunk line may lawfully make any allowance out of its published rate either to the tap line or to the lumber company.

VICTORIA, FISHER & WESTERN RAILROAD.

The Victoria, Fisher & Western Railroad Company is owned by the stockholders of the Louisiana Long Leaf Lumber Company, the stock in the two companies being held by the same persons and in the same relative proportion. They have the same officers. The railroad corporation was formed in November, 1902, and its capital stock, amounting to \$300,000, was issued as a dividend to the stockholders of the lumber company in exchange for the tracks and equipment then owned and theretofore operated by the lumber company. A part of the track seems to have been constructed some 25 years ago and was acquired by the lumber company in 1900. The tap line connects with the Texas & Pacific at Victoria, La., and runs southward, crossing the Kansas City Southern at Fisher and terminating at a point known as Cain, a total distance of about 31 miles. There are about 25 miles of logging spurs and sidetracks. The tap line has 5 locomotives, 4 cabooses, 3 box cars, 1 flat car, and 105 logging cars. It does not operate any trains on regular schedule.

The lumber company has two mills, one about a mile from the junction with the Texas & Pacific at Victoria, and the other about

half a mile from tracks of the Kansas City Southern at Fisher. The Victoria mill has been in operation for about 25 years. The timber holdings of the lumber company approximate 95,000 acres, in addition to which it owns some 80,000 acres of cut-over land.

The tap line hauls the logs from the woods to the mill, making a charge of \$1.50 per 1,000 feet, which is supposed to cover only the service performed on the logging spurs and not the haul over the main track. The greater portion of the lumber manufactured at Fisher is delivered to the Kansas City Southern, being switched about one-half mile by the tap line, while the greater part of the lumber produced at the mill at Victoria is moved by the tap line one mile to the Texas & Pacific. A small amount of the lumber from each mill moves over the tap line to the more distant trunk line, but the same divisions are paid by the two trunk lines from both mills. These allowances range from three-fourths cent to 4 cents per 100 pounds; and the joint rates are the same as the rates published from adjacent mills on the trunk lines, with the exception of traffic moving to points in Texas, where $1\frac{1}{2}$ cents per 100 pounds is added to the junction-point rate.

The tap line does not carry passengers; and more than 99 per cent of the total tonnage, amounting for the year 1910 to 316,676 tons, is furnished by the proprietary company. Its annual reports to the commission indicate an accumulated surplus of \$13,509.17 at the end of the fiscal year, June, 1910.

We can not recognize the right of this tap line to participate as a common carrier in joint rates on the product of the mills of the proprietary company. The lumber rate of the Kansas City Southern must be held to apply from the mill at Fisher, and the rate of the Texas & Pacific from the mill at Victoria. Each of those lines may arrange with the lumber company to perform the necessary switching service for the distance of one-half mile and one mile, respectively, and may make it a reasonable compensation under section 15.

OUACHITA & NORTHWESTERN RAILROAD.

The Ouachita & Northwestern Railroad Company was incorporated in May, 1905, and its stock was distributed by the Louisiana Central Lumber Company as a dividend to the stockholders of that company. Title to the right of way, track, and equipment theretofore owned and operated by the lumber company was turned over to the new corporation. The two companies are practically identical in their stockholders and in their officers.

The lumber company has two mills, one at Clarks and the other at Standard, La., each being about one-half mile from the track of the Iron Mountain. Each is served by rails of the Ouachita & Northwestern. I. C. C.

western. In other words, the tap line as described on the record consists of two separate tracks, respectively designated as the Jackson division and as the Standard division. The Jackson division serves the mill at Clarks and extends from the point of connection with the Iron Mountain in a northwesterly direction for about 20 miles, with logging branches aggregating 15 miles in length. This track was not completed and put in operation until September, 1910. There had been, however, a track, constructed in 1903, running southeasterly from Clarks for a distance of 14 miles. When the timber in that direction was cut out the track was taken up and the line abandoned. In doing this no consideration was given to the rights or convenience of the farmers and one or two other outside shippers in that vicinity. There was also a small lumber mill about 6 miles southeast of Clarks which shipped two or three carloads a week over that track. That mill was still in operation at the time of the hearing, and apparently had to team its lumber to the Iron Mountain. The other section of the tap line connects with the Iron Mountain at Standard, which is some miles south of Clarks, and runs for 9 miles eastward to a point known as Summerville. This track was acquired from another lumber company in 1906.

The tap line has 7 locomotives and 150 cars. Its logging-train service is apparently irregular. It hauls the logs to the mills and switches the lumber to the trunk line, which allows a division of from 2 to 4 cents per 100 pounds out of the rate, most of the traffic being subject to the maximum division. For the movement of the logs to the mill and the expense of maintaining and changing the logging spurs the tap line makes a charge of \$1.50 per 1,000 feet against the lumber company. This is in addition to the division of the through rate. The outside traffic is comparatively small, amounting for the year ending June 30, 1910, to but 1,661 tons out of an aggregate movement of 412,205 tons, or a fraction of 1 per cent. The annual reports to the Commission indicate a substantial profit from its operations.

An interesting fact was developed on the hearing of this case. It appears from the testimony of its witness that an understanding was had between the Ouachita & Northwestern and the Iron Mountain respecting the payment of divisions; and the agreement on the part of the Iron Mountain to allow 4 cents per 100 pounds was accepted by the lumber company as a warrant for purchasing additional timber lying farther from the trunk line. It is frankly stated that other timber lying nearer the trunk line would have been purchased had not this concession been granted by the Iron Mountain to the tap line.

This tap line is clearly in the class of cases disposed of in our original report. Each of the mills of the proprietary company is

about one-half mile from the tracks of the Iron Mountain and the group rate therefore extends from the mills. If it performs for the Iron Mountain the service of moving the cars to and from the mills, the lumber company may have a reasonable allowance under section 15 of the act.

LAKE CHARLES RAILWAY.

The Lake Charles Railway & Navigation Company was incorporated in 1908 as a common carrier of freight only, and all but \$2,000 of its capital stock, amounting to \$50,000, was issued to four stockholders of the Powell Lumber Company in consideration for the logging road theretofore constructed, and which at one time had been known as the Kelly Tram, together with the rolling stock and certain boats belonging to the lumber company. The railroad corporation and the lumber company are owned by the same stockholders and have the same officers. Moreover, there is an indebtedness to the lumber company of nearly \$30,000.

The track of the Lake Charles Railway & Navigation Company connects with the Iron Mountain at Edna, La., and extends from that point southward and westward to a point known as Hecker, on the Calcasieu River. There are 20 miles of incorporated railroad, in addition to which the lumber company has several miles of unincorporated spurs connecting with the main track at various points, the steel in which is furnished by the tap line. The tap line has 3 locomotives, 15 flat cars, and 50 logging cars. It also owns and operates one steamboat and two barges, which run from Hecker down the Calcasieu River to Lake Charles, a distance of about 25 miles. One log and lumber train is run over its track between Hecker and Edna daily in each direction.

The lumber company has a mill at Edna directly on the tracks of the Iron Mountain, which switches the empty and loaded cars for lumber movements from the mill. It also has a mill at Lake Charles, La., to which the Kansas City Southern, the Iron Mountain, and the Southern Pacific all have direct access, and from which they switch the loaded cars of lumber. The only service which the tap line performs for the lumber company, therefore, is the movement of the logs from the woods to the mill at Edna on the one hand, or to Hecker and thence by boat or barge to the mill at Lake Charles on the other hand. The divisions allowed by the trunk lines range from three-fourths cent to 3 cents per 100 pounds. The annual report to the Commission for the year 1910 indicates the movement of 212 tons of naval stores and 1,014 tons of merchandise and supplies, in addition to 108,700 tons of lumber. There is very little outside traffic, and the record does not disclose the existence of any independent mills on the line. The town of Hecker is said to have

a population of nearly 500, with two general stores and a turpentine plant. The lumber company has a commissary which, as we assume, took a substantial portion of the merchandise shipments moving over the tap line.

The lumber is moved directly from the mills by the trunk lines, as heretofore stated. No allowance may lawfully be paid to the tap line on account of the service which it performs for the proprietary company.

ARKANSAS SOUTHEASTERN RAILROAD.

The Arkansas Southeastern Railroad serves the mill of the Summit Lumber Company at Randolph, La., a point on the Rock Island, which passes within 150 yards of the plant. The track is laid from Randolph in a southeasterly direction for about 28 miles, to Farmer-ville, where a connection is made with the Iron Mountain. At a point 17 miles from the mill known as McKay an unincorporated logging road of the Summit Lumber Company connects with the tap line and on those tracks the lumber company operates logging trains, using three locomotives. The tap line itself has 2 locomotives, a combination passenger car, 18 flat cars, and 73 logging cars. The tap line was constructed by the lumber company several years before its incorporation, in 1904, which is admitted to have taken place for the purpose of obtaining divisions of through rates. The record indicates certain changes shortly prior to the hearing in the ownership of a majority of the stock of the tap line. Our understanding, however, is that the ownership of the tap line is vested in persons who are directly interested in the mill at Randolph, which it serves. In other words, the mill and tap line are still to all intents and purposes one and the same investment.

The Summit Lumber Company loads the logs on the cars and moves them with its equipment over the unincorporated tracks to the junction with the tap line; and the tap line hauls the logs to the mill without charge. The lumber is switched by the tap line from the mill to the junction, a distance of three-quarters of a mile. The Rock Island allows from 1 to 4 cents per 100 pounds out of the rates on lumber. For the year ending June 30, 1910, the shipments of the Summit Lumber Company aggregated 70,702 tons, while the traffic of outsiders was 2,469 tons. There is a small hardwood mill owned by W. F. Usrey & Company, which purchases its logs from the Summit Lumber Company; there are also a small yellow-pine mill and stave mill which use the tap line. One mixed train is run in each direction daily on which a few passengers are carried. The revenue from that source for the year 1910, however, was only

\$778.90. The lumber company furnishes 96 per cent of the traffic of the tap line.

This mill is within 150 yards of the Rock Island rails, and we hold that no allowance out of the rate may lawfully be made by the Rock Island. On lumber delivered by the tap line to the Iron Mountain at Farmersville a division of 2 cents may be paid to the tap line.

LOUISIANA RAILWAY.

The stockholders of the Grant Timber & Manufacturing Company own a majority if not practically all of the capital stock of the Louisiana Railway Company, and practically the only service performed by the latter is the movement of logs and lumber for the proprietary company. The two corporations have the same officers.

The track of the tap line is about 16 miles in length, connects at Grant, its eastern terminus, with the Louisiana & Arkansas, crosses the Iron Mountain at Selma, running thence westerly for several miles and turning northward, crossing the Louisiana & Arkansas, and terminating at a point in the timber known as Harrell; there are also about 14 miles of unincorporated logging tracks the steel in which is owned by the tap line, but which are laid and maintained by the lumber company. About 9 miles of the main track was purchased from prior owners for the sum of \$85,000; the remainder was apparently constructed by the lumber company and turned over to the tap line, the cost being borne out of the earnings. The cost of the entire track, which is laid with light rail, and equipment, aggregated about \$200,000. The tap line has 6 locomotives, 25 flat cars, and 93 logging cars.

The lumber company has two mills in operation at Selma, one immediately adjacent to the line of the Iron Mountain and the other within 300 feet of its right of way. Its timber holdings aggregate more than 100,000 acres and include certain lands where the lumber company has private logging spurs reached by the tap line by means of trackage rights over the Louisiana & Arkansas. The tap line hauls the logs all the way from the point of loading to the mill, and the trainmen unload them into the pond. A charge of \$1 per 1,000 feet is made against the lumber company, which is supposed to cover the rental of the steel in the unincorporated tracks as well as the service performed by the tap line in moving the logs thereon. The loading track at one of the mills in Selma is owned in part by the Iron Mountain and in part by the lumber company. The other mill has a short spur track, less than 300 feet in length, connecting with the Iron Mountain. The record does not clearly indicate whether the locomotive of the Iron Mountain or that of the tap line places the empty cars and switches the loaded cars for lumber movements from

the mills or either of them. About one-half of the traffic of the lumber company is forwarded over the Louisiana & Arkansas, which entails a movement by the tap line of the empty car for a distance of $2\frac{1}{4}$ miles from Grant to Selma, and of the loaded car for the same distance from the mills at Selma to Grant. Each of the trunk lines publishes rates in connection with the tap line, and each makes an allowance of from 2 to 4 cents per 100 pounds. As heretofore stated, the tap line has practically no outside traffic. During the year covered by the record it moved 260,000 tons of logs for the proprietary company, and 75,848 tons, or about 3,000 carloads, of lumber.

The tap line makes annual reports to the Commission. Its capital stock amounts to \$100,000, of which \$75,000 was issued as a stock dividend. No cash dividends have been paid, but large sums have been taken from earnings to extend or improve the property. There was apparently a surplus on June 30, 1910, of about \$80,000, against which must be balanced an indebtedness of nearly \$20,000 due on open account to the lumber company.

We find on the facts disclosed that the Louisiana Railway, in the movement of the logs and lumber of the proprietary company, is a plant facility, and comes within the group of cases embraced in the original report herein. The mills at Selma are within 300 feet of the Iron Mountain; and for the reasons stated in the original report we can not recognize the propriety of any allowance for the movement of cars between the mill and the Iron Mountain tracks, although performed by the lumber company itself. Our view is, however, that for the movement of lumber from the mill to the Louisiana & Arkansas, a distance of about $2\frac{1}{4}$ miles, that company may make an allowance of a reasonable amount under section 15 of the act to the lumber company.

RED RIVER & GULF RAILROAD.

The Red River & Gulf Railroad Company was incorporated in April, 1905, and its capital stock, amounting to \$101,000, was delivered to the Crowell & Spencer Lumber Company and distributed by the latter as a dividend to its stockholders. The lumber company constructed the track and deeded the property to the railroad corporation. The two companies are, and have been from their inception, identical in interest, and they have the same officers.

The tap line connects with the Iron Mountain at Long Leaf, La., and with the Rock Island, Texas & Pacific and Southern Pacific at LeCompte, the track between those points being about 13 miles in length. The timber has all been cut away along the main line; but the lumber company has an unincorporated track about 4 miles in length, connecting with the tap line and running into the

standing timber. The equipment of the tap line consists of 1 locomotive and combination passenger and freight car, and 3 flat cars. The lumber company itself owns and operates 3 locomotives and about 50 logging cars.

The mill of the lumber company is at Long Leaf, within a quarter of a mile of the tracks of the Iron Mountain. The lumber company loads the logs on its cars in the woods, and with its engines hauls them over the unincorporated tracks and thence over the incorporated tap line to the mill under a trackage privilege, for which it pays the tap line 25 cents per 1,000 feet, log scale. In other words, the logs are moved to the mill precisely in the manner that they were before the incorporation of the tap line, with the exception that the lumber company goes through the form of paying a trackage charge. Before the incorporation practically all the lumber moved over the Iron Mountain and no divisions were paid. But at the time of the hearing the bulk of the lumber moved over the tap line to the Rock Island, a distance of over 12 miles, the divisions paid by that company ranging from $2\frac{1}{2}$ cents to $4\frac{1}{2}$ cents per 100 pounds. The allowance of the Iron Mountain is uniformly 3 cents, while the Southern Pacific pays 3 and 4 cents per 100 pounds. The Texas & Pacific grants no divisions.

There is an independent mill on the tap line about 5 miles from LeCompte, with a capacity of about 40,000 feet per day. It hauls its logs to the mill by wagon. The lumber traffic of the tap line for the year 1910 amounted to 37,820 tons, with 1,363 tons of other freight. The revenue from the freight was \$29,576.56, in addition to which the lumber company paid \$5,191.36 for trackage rights for its log trains, and the Rock Island paid \$6,666.75 for the privilege of running trains loaded with gravel over a portion of the tap line. The Red River & Gulf runs one train daily in each direction, on which passengers are carried; and its revenues from passengers amounted to \$1,213.40 for the year 1910. These figures are taken from the annual reports to the Commission, which show an accumulated surplus on June 30, 1910, of \$6,865.74, after the payment of a 40 per cent dividend during that year, amounting to \$40,400. In the year 1907 it paid a 15 per cent dividend, with 40 per cent in 1908, and 20 per cent in 1909, making a total of \$116,150 distributed in four years to its stockholders, on a capitalization of \$101,000.

The allowances paid here are clearly excessive and amount to a rebate to the lumber company. The allowance by the Iron Mountain to the tap line for switching the product of the mill to its rails may not lawfully exceed \$2 a car; and we fix the division out of the rates that may lawfully be made by the Rock Island and other trunk lines on the products of the mill of the controlling company at Long Leaf at 2 cents per 100 pounds as a maximum.

ZWOLLE & EASTERN RAILWAY.

In the year 1899 the Sabine Lumber Company built a sawmill for the manufacture of yellow-pine lumber at Zwolle, La., within one-half mile of the tracks of the Kansas City Southern, and a planing mill immediately on those tracks. At the same time, and for the purpose of bringing the logs to its mill, the lumber company constructed several miles of track which it transferred in 1904 to a corporation then organized by it and known as the Zwolle & Eastern Railway Company. The capital stock of the new corporation, amounting to \$20,000, was taken in part exchange for the track and equipment, and the balance of its value, amounting to \$75,000, has since been paid for out of the earnings of the tap line. The stockholders of the lumber company own practically the entire capital stock of the tap line; and the two companies are not only identical in interest, but have the same officers and several joint employees.

The main track of the Zwolle & Eastern is 14 miles in length and extends in a southwesterly direction from Zwolle to a point known as Blue Lake. There are about 4 miles of spurs and sidetrack. The equipment consists of 3 locomotives, 1 combination passenger and baggage car, a box car, and about 60 logging cars. There are no station structures, although there are said to be several small towns or settlements along the line. Blue Lake is a logging camp. The only independent industry on the line is a small hardwood mill at a point known as Gibson, about 1 mile from the junction with the Kansas City Southern.

The logs are loaded on the cars by employees of the tap line and are hauled by it over the logging spurs and thence over its main line to the mill, a charge of \$1.75 per 1,000 feet, log scale, being debited against the lumber company for the services on the logging spurs. For hauling logs over the main track from Blue Lake to Gibson the tap line charges the hardwood mill \$2 per 1,000 feet, log scale. The tap line switches shipments of lumber from the sawmill to the trunk line, a distance of about one-half mile; but nearly 90 per cent of the shipments of the proprietary company are dressed lumber, which is taken by the trunk line directly from the loading track. The lumber shipments of the hardwood mill at Gibson are moved by the tap line a distance of 1 mile to the Kansas City Southern. The divisions allowed by the trunk line are from one-half cent to 4 cents per 100 pounds, averaging about 2 cents.

The statement made on the record is that the passenger revenue of the tap line amounts to \$60 per month, and that there are two mixed trains moving daily in each direction on which passengers are carried. The annual reports to the Commission do not bear out this claim, however, for the fiscal year 1911, the revenue being shown

thereon as \$385.15, with no revenues from passenger traffic for the preceding fiscal year. The volume of forest products exceeded 110,000 tons for the year 1910, while the inbound and outbound movements of miscellaneous material and supplies aggregated only 510 tons. The tap line has been operated at a substantial profit, its accumulated surplus on June 30, 1910, amounting to \$114,516.67, the major portion of which has been utilized in the payment of its indebtedness of \$75,000 to the lumber company, of which mention has already been made.

The Kansas City Southern itself removes the dressed lumber from the planing mill and we should regard any allowance on such traffic either to the tap line or to the lumber company as clearly unlawful. While about 10 per cent of the shipments are rough lumber, which is actually switched by the tap line for a distance of nearly one-half mile, we infer that the loading track of the sawmill is within a very much less distance of the rails of the Kansas City Southern, and that if that company cared to remove the cars from the sawmill it could do so with a switching movement of less than 1,000 feet. If this understanding is not correct, under the principle stated in the original report, the lumber company may have an allowance from the Kansas City Southern under section 15 for switching the rough lumber to the trunk line.

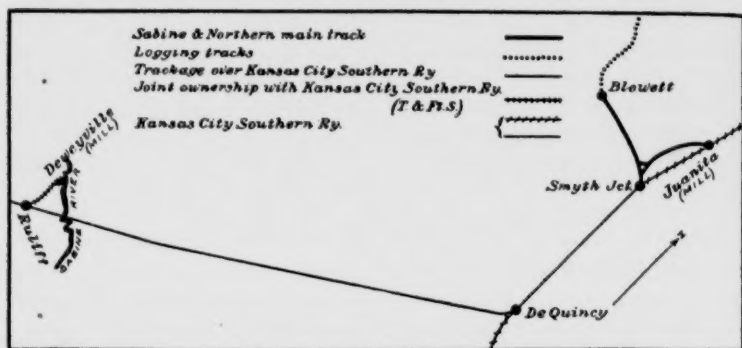
SABINE & NORTHERN RAILROAD.

The Sabine & Northern Railroad Company is controlled, through the ownership of its entire capital stock, by a lumber company known as the Sabine Tram Company, which has a mill at Juanita, La., and another at Deweyville, Tex. The lumber company has some 23,000 acres of timberland in Louisiana which is reached by the tap line, and a tract of approximately 60,000 acres in Texas. The mill at Deweyville has been in operation since 1899, but the mill at Juanita was built more recently.

The Sabine & Northern connects with the Kansas City Southern at Smyth Junction and extends westward for about 5 miles to a camp or logging town known as Blewett and having a population of about 500. From Juanita Junction, which is about 1 mile west of Smyth Junction, a track runs northward for a distance of $3\frac{1}{2}$ miles parallel to and joining the Kansas City Southern at Juanita. These tracks are laid with 35 and 50 pound steel rails, and the right of way is apparently owned by the tap line.

The tap line enjoys trackage rights over the Kansas City Southern from Smyth Junction southward for 8 miles to De Quincey, and westward about 21 miles to Ruliff, on the west bank of the Sabine River in the state of Texas. From Ruliff it operates over a track $1\frac{1}{2}$ miles long owned jointly by the Texarkana & Fort Smith, a part of

the Kansas City Southern system, and the Sabine Tram Company, to the mill at Deweyville. It is of interest to observe that the trackage rights in question originated in a contract entered into between the Kansas City Southern and the Sabine Tram Company, before the opening of the mill at Juanita and the building of the tracks into that point; that this contract was subsequently assigned to the tap line when organized; and that it is limited to the movement by the tap line over the Kansas City Southern of trainloads of logs belonging to the Sabine Tram Company. The joint track from Ruliff to Deweyville was laid in 1899 and is used by the Sabine & Northern simply for the movement of logs to the lumber company's mill at that point; the Texarkana & Fort Smith apparently furnishes a general freight service for Deweyville, a town of 1,500 inhabitants. The right of way for the joint track was furnished by the lumber com-



pany, which did the grading and furnished the ties, while the Texarkana & Fort Smith supplied and laid the steel.

The tap line was incorporated in February, 1906, for the purpose, as is admitted of record, of legalizing divisions from the Kansas City Southern. Its equipment consists of one locomotive, one flat car, and a caboose, together with a second locomotive and 70 log cars which it rents from the lumber company. The locomotives have proper safety appliances.

The lumber company has unincorporated logging spurs aggregating in length about 16 miles and extending into the timber from the terminus of the incorporated tap line at the logging camp known as Blewett. The lumber company operates these spurs and with its own power moves the logs to Blewett. They are then taken by the locomotive of the tap line to the mill at Juanita, no charge being made against the lumber company for this service. The lumber produced at the Juanita mill is loaded directly on the tracks of the Kansas City Southern, which switches the cars to and from the

mill. The tap line also takes carloads of logs at Blewett and hauls them over its own rails to Smyth Junction, and thence, under the trackage rights heretofore referred to, over the Kansas City Southern to Ruliff and the joint track to Deweyville. It pays the Kansas City Southern \$1.75 per car for the trackage right and makes a charge against the lumber company of \$5.25 per car for the entire movement of the logs from Blewett to Deweyville. This charge, however, is subsequently refunded by the tap line on four carloads of logs for each carload of lumber shipped out, the rates established by the Kansas City Southern and participated in by the tap line being on the milling-in-transit plan. The lumber produced at the Deweyville mill is moved by the Texarkana & Fort Smith from the mill. It will be seen therefore that in the case of each of the two mills the tap line hauls the logs but does not haul the lumber. It receives an allowance from the Kansas City Southern of from three-fourths cent to 3 cents per 100 pounds, except to destinations in the state of Texas, and to certain other territories where no division is allowed. It is claimed that the bulk of the business goes to points where the Sabine & Northern has no allowances, but the proof is not definite on this point.

The traffic of the Sabine & Northern consists almost entirely of the logs of the Sabine Tram Company and supplies for its logging camp and employees. Its whole tonnage for the year 1910, exclusive of forest products, was 1,435 tons, of which 235 tons was coal and 279 tons iron and steel. All of this freight was inbound, nothing being moved out except logs. No charge is made for such few passengers as are carried, and it has no special facilities for the handling of traffic for the public if any were offered.

It files annual reports with the Commission, from which it appears that the operating expenses shown on its books are slightly in excess of the revenues.

The Kansas City Southern or its subsidiary line, the Texarkana & Fort Smith, takes the manufactured lumber from both of the mills of the proprietary company. Upon the facts of the case, therefore, no allowance may lawfully be made out of the rates on the traffic of these mills. The trackage right acquired over the Kansas City Southern crosses the state line; although assigned by the lumber company to its tap line, the agreement limits the right to the logs of the controlling lumber company. This we regard as of doubtful validity.

TREMONT & GULF RAILWAY.

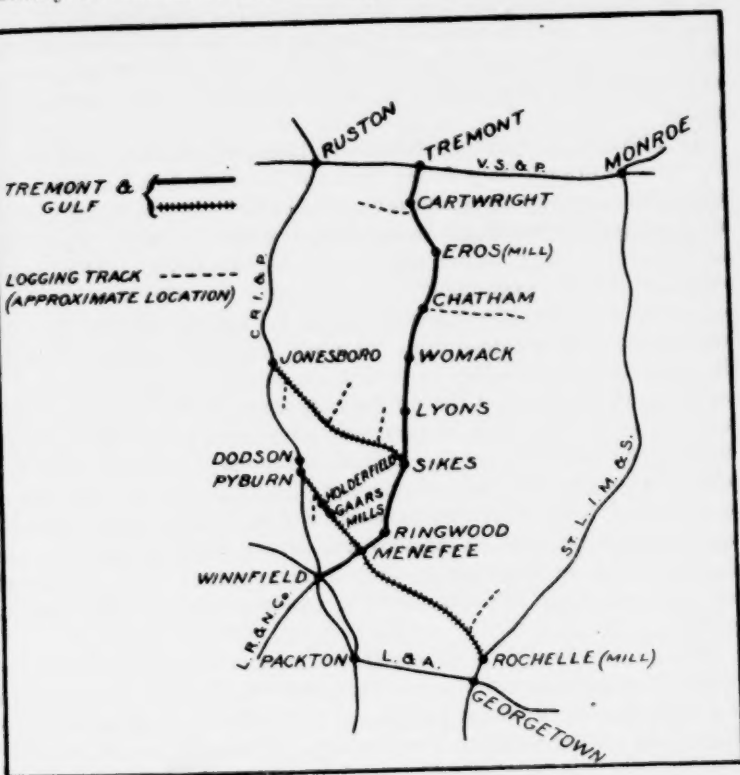
The main line of the Tremont & Gulf Railway extends from a connection with the Vicksburg, Shreveport & Pacific at Tremont, La., southward for a distance of practically 50 miles to Winnfield, La., a town of 4,000 people, with two banks, a number of

stores, and several mills and commercial enterprises, where it connects with the Rock Island, Louisiana & Arkansas, and Louisiana Railway & Navigation Company. It is laid with 60-pound steel rails, with a maximum grade of 1 per cent and a maximum curvature of 4°; its bridges are substantial; it is equipped with water tanks, coal chutes; and has telephone and telegraph lines for the dispatching of its trains. It has 6 agency stations, with 4 substantial depot buildings, costing from \$200 to \$7,000 each; and 30 section houses, 3 scales, a freight warehouse, etc. It also has 1 passenger and 3 freight locomotives; 3 combination coaches and passenger cars; 148 box cars; 50 flat cars, a pile driver, and cabooses; and its equipment has the necessary safety appliances. There are 18 or 20 men employed in its train crews and it has over 100 section or track men. It also has a full set of general officers, including a vice president, general superintendent, and general freight and passenger agent. It has a daily passenger train, consisting of a combination baggage, mail, and express car, and passenger coach, which is scheduled to make the 50 miles from Winnfield to Tremont in a little over two hours. It also operates a freight service as the traffic requires. It reports a passenger revenue of \$17,000 for the year 1910. In addition to the town of Winnfield, which is its southern terminus, there are seven or eight small settlements along its line to and from which some traffic is hauled for the public and at which are located several small independent mills. The country is not well developed agriculturally and there are only occasional shipments of cotton, peanuts, and cattle for the farmers. Out of a total freight movement of 191,374 tons during the fiscal year 1910, 167,270 tons were forest products, of which the major portion was supplied by the mills of the Tremont Lumber Company. It is stated that the shipments of that company average not less than 450 carloads per month, while the independent mills ship about 95 carloads. For the tap line itself the claim is made that more than 72.6 per cent of its revenue is earned on lumber and merchandise handled for the account of the Tremont Lumber Company, while as much as 27.4 per cent is for other interests.

The Tremont & Gulf Railway also owns and operates a branch line, crossing its main line at a point about 5 miles north of Winnfield, connecting with the Rock Island at Pyburn and running for a distance of about 29 miles eastward to a connection with the Iron Mountain known as Rochelle. It also operates a branch leased from the Tremont Lumber Company and extending from a junction with the Rock Island at Jonesboro about 20 miles eastward to a connection with the tap line at Sykes. There are doubtless logging camps along these branch lines; there is a single small independent sawmill on

ch branch; but there are neither towns nor settlements; and apparently these branch lines are used primarily for the benefit of the Tremont Lumber Company.

The capital stock of the Tremont & Gulf Railway Company, of which \$2,000,000 has been issued, is held by the Southern Investment Company, which also owns the stock of the Tremont Lumber Company, and other lumber industries elsewhere. We find, therefore, an identity of interest between the tap line and the Tremont Lumber



Company, which has vast timber holdings along the tap line, amounting at the date of the hearing to approximately 235,000 acres. The lumber company also has three large mills at present in operation and two that have ceased running.

The principal mill is located a few hundred feet from the Iron Mountain right of way at Rochelle, on one of the branch lines heretofore mentioned, and about 40 per cent of the total manufactured output of the Tremont Lumber Company is shipped therefrom.

The balance of the output is about evenly divided between its mill at Eros, which is on the main road of the tap line, about 11 miles south of Tremont, and the mill at Jonesboro, from which there is a switching movement to the Rock Island of about 3,000 feet over the branch which the tap line operates under lease from the lumber company. The lumber from each of these mills is not routed over the line of the nearest trunk-line connection, but is distributed among the various trunk lines, the Rock Island getting about 35 per cent of the whole traffic, the Iron Mountain 20 per cent, the V., S. & P. 33½ per cent, and the remainder moving over the Louisiana Railway & Navigation Company from Winnfield. It is said that the average haul over the Tremont & Gulf on the finished lumber is about 26 miles.

In addition to the incorporated line, including, as heretofore stated, 20 miles of branch lines leased from the Tremont Lumber Company, the latter company owns and operates upward of 50 miles of logging road and spurs reaching into its extensive timber tracts. They connect with the incorporated tap line at various points. The lumber company has trackage rights over the railroad, under and by virtue of which it moves logging trains from its various logging spurs in the timber to its several mills. In other words, the incorporated tap line does not haul the logs of the lumber company to its mills; and it made no charge against the lumber company for the trackage rights until after the hearing. It now gets a trackage toll of 35 cents per train-mile. It seems that the understanding had previously been that the incorporated tap line was sufficiently remunerated by its divisions on the manufactured lumber to warrant it in giving away the trackage privilege. In the operation of the private logging spurs and the movement of its log trains over the incorporated line, the lumber company uses 9 or 10 locomotives; it also has more than 100 logging cars.

For the movements of lumber from the various mills to the trunk-line connections the tap line receives an allowance or division of from 2.4 cents to 6 cents per 100 pounds. The lumber is billed as originating at the respective mills, there being no milling-in-transit arrangement, as the logs are brought into the mills by the lumber company itself. An allowance of 6 cents for its average haul of 25 miles yields a revenue of nearly 5 cents a ton-mile. The empty car is furnished by the connecting trunk line.

In spite of the comparative completeness of its equipment and organization it is perfectly apparent that this tap line is a facility of the Tremont Lumber Company. That is the way it has been used. The lumber company freely used its entire trackage to haul its logs without cost until after the hearing, and now enjoys trackage rights

at a low toll per train-mile over its total mileage. This we regard as unlawful. We do not understand upon what principle a shipper may use the rails of a line that calls itself a common carrier either free of charge or on terms that are not published and offered to other shippers.

On the brief filed in behalf of this tap line it is said that if it be contended that the tap line is not entitled to a division out of the rate on shipments delivered to the Iron Mountain from the Rochelle mill or on shipments delivered to the Rock Island at Pyburn from the mill at that point—

It must be remembered that the strategic position of this company is such that five railway lines compete for its traffic. There is no legal reason why a railway line should not sell its traffic to that competitor which gives it the best division. The through rates remaining unchanged, the public is not interested.

This view, however, overlooks every essential element in the controversy. The principal mill of the lumber company is at Rochelle and is within a thousand feet of the Iron Mountain. The mill at Jonesboro is about 3,000 feet from the Rock Island, and the switch track reaching it is the property of the lumber company, the tap line using it under lease. Under these circumstances divisions out of the rate, amounting in some cases to 6 cents per 100 pounds, on the products of those mills when shipped out over those connections are unlawful rebates. This is less true only in degree of the divisions out of the rate on the products of the other mills. Nothing should be paid by the Iron Mountain on the products of the Rochelle mill or by the Rock Island on the products of the lumber company's mill at Jonesboro in excess of a reasonable switching charge, which we fix at \$1.50 a car. On the product of the mill at Eros routed through Tremont a division of $1\frac{1}{2}$ cents may be made out of the rate. On the traffic of that mill moved through Sykes to junctions with other trunk lines, a division out of the rate of 2 cents per 100 pounds may be made. On the products of the mill at Jonesboro moved through Sykes to Rochelle or to Tremont or delivered to the Louisiana Railway & Navigation Company at Winnfield, a division of 2 cents may be paid out of the rate. On the products of the mill at Rochelle, delivered to the Rock Island at Winnfield, Pyburn, or Jonesboro, or to the Vicksburg, Shreveport & Pacific at Tremont, a like division may be made out of the rate.

NACOGDOCHES & SOUTHEASTERN RAILROAD.

The Nacogdoches & Southeastern Railroad is one of the tap lines of the Frost-Johnson Lumber Company, having been acquired by that company in 1910, when it purchased the mill of the Hayward

Lumber Company, at Hayward, Tex. The tap line was incorporated in 1904 and has capital outstanding to the amount of \$245,400, which is in the hands of the stockholders of the Frost-Johnson Company. The track connects with the Texas & New Orleans Railroad at Hayward and extends through the timber to a point known in the record as Woden. Since the hearing an additional mile of the track has been put in operation westbound, from Hayward to Nacogdoches, and connection thus effected with the Houston East & West Texas. The entire length of the track operated, including sidings, is about 17 miles. It has 2 locomotives, 1 combination passenger car, 8 freight cars, and 54 logging cars. In addition to the tracks described, the lumber company has 15 miles of unincorporated logging spurs, on which it operates 1 locomotive that it owns and 1 leased from the tap line.

The tap line runs one train daily in each direction and carries a few passengers, its revenue from that source during 1910 being \$322. The logs are hauled to the mill by the lumber company, which enjoys trackage rights for that purpose over the tap line, a yearly rental of \$1,000 or \$1,500 being paid to the tap line. The tap line switches the cars for lumber shipments for a distance of about one-quarter of a mile to the Texas & New Orleans or about one and a quarter miles to the Houston East & West Texas. There is one other small sawmill on the line the lumber traffic of which is hauled a distance of about 10 miles by the tap line, but more than 93 per cent of the lumber traffic for the year 1910 was handled for the Frost-Johnson Company, which supplied 88 per cent of the entire tonnage of the tap line, in addition to using the tracks for its own logging trains.

No allowance may be made out of the rate by the Texas & New Orleans on the products of the mill of the controlling company, which, as stated, is within a few hundred feet of its rails. For switching the products of the mill to its rails at Nacogdoches the Houston East & West Texas may allow the tap line out of the rate a reasonable switching charge, which we fix at \$1.50 a car.

TEXAS SOUTHEASTERN RAILROAD.

The Texas Southeastern Railroad was originally constructed by the Southern Pine Lumber Company as a private logging road, but was incorporated in 1900 with a capital stock of \$250,000, of which \$238,900 has been issued and is owned by the stockholders of the lumber company. The tap line owes the lumber company \$365,000.

The mills of the lumber company are at Diboll, on the track of the tap line, some 3,000 feet or more from the line of the Houston East & West Texas. The tap line runs northward from that point

for a distance of 18 miles to Neff, where a connection is had with the Eastern Texas. There is also a track nearly 10 miles in length branching out from the so-called main line and terminating at Lufkin, a point on the Houston East & West Texas and the Cotton Belt. At Vair the Texas Southeastern meets the Groveton, Lufkin & Northern, another tap line that is a party to this record, which enjoys trackage rights over the Texas Southeastern to Lufkin. For this trackage right the Texas Southeastern receives from the Groveton, Lufkin & Northern an annual rental of \$450 per mile, together with a proportion of the maintenance expense. The lumber company has several miles of logging tracks connecting with the incorporated road at Vair, but these spurs are operated for it by the tap line.

The Texas Southeastern has 4 locomotives, 1 caboose, 1 combination passenger and baggage car, 10 box cars, and 84 freight cars. Its regular service consists of one "mixed train" moving daily in each direction, on which passengers are carried.

The lumber company loads the logs and assembles the loaded cars on the unincorporated spurs; and from the assembling point they are moved by the tap line to the mill, a charge of \$2.50 being made where the movement is less than 10 miles, and \$3 per car where it is more than 10 and less than 20 miles. On lumber from the mill routed over the Houston East & West Texas through Diboll, the tap line performs a switching movement of from 3,000 to 8,000 feet. But 95 per cent of the lumber is said to move out through Lufkin, entailing a haul by the tap line of about 17 miles. Most of the traffic is delivered at Lufkin to the Cotton Belt, but about 15 per cent is taken at Lufkin by the Houston East & West Texas. The divisions accorded by the last-named trunk line are on a percentage basis and average about 3 cents per 100 pounds. But on traffic moving for Cairo, for example, the allowance for the haul of 17 miles is 4 cents per 100 pounds, while the trunk lines for their haul of 640 miles retain 12 cents. The Cotton Belt allows from 2 to 4 cents per 100 pounds.

During the calendar year 1910 the tap line moved 58,458 tons of lumber and ties, most of which was supplied by the proprietary company. It also handled 2,200 tons of miscellaneous freight, of which about 50 per cent was supplied by the controlling interests. Its annual report for the fiscal year ending June 30, 1910, shows a total revenue of \$98,543.91, of which \$2,722.01 was receipts from passenger service. While the tap line keeps separate accounts, the statement made of record is that the lumber company acts as its financial agent and supplies all the funds needed. An accumulated surplus of \$58,538.88 was shown on the books on June 30, 1910, but this had been expended in betterments.

The lumber rates of the Houston East & West Texas must be held to extend from the mill, which as heretofore stated is about 3,000 feet from its line, and it may pay the tap line a switching charge of \$2 per car for handling the products of the mill to its rails; when the products move out over the tap line to other trunk-line connections they may allow the tap line a division out of the rate not exceeding 2 cents per 100 pounds.

TIMPSON & HENDERSON RAILWAY.

The mill of the Ragley Lumber Company was built in 1900 at Ragley, Tex., and about 10 miles of track laid to a connection with the Houston East & West Texas and the Texas & Gulf railways at Timpson. The following year the track was incorporated as the Timpson & Northwestern Railway Company. The lumber company retained the ownership of, or constructed, about 12 miles of additional track extending northwest from Ragley into the timber. In August, 1909, a new corporation was formed, known as the Timpson & Henderson Railway Company, about 60 per cent of the stock of which was issued to and is held by the stockholders of the Ragley Lumber Company; about 40 per cent was taken by citizens of Henderson. The new corporation not only took over the track of its predecessor, but also the 12 miles of logging road from Ragley to Pine Hill. The track was extended about 12 miles into Henderson, so that the tap line as in operation at the time of the hearing was 34 miles in length, beginning at Timpson and terminating at Henderson, where a connection is made with the International & Great Northern. In addition to the mill of the Ragley Lumber Company there are two small mills near Pine Hill, and a planing mill at a point known as Long Branch. There are also four small towns or settlements, each having one or more stores, and two of them having banks. Timpson and Henderson, the terminal points, each has a population of 3,000 or 4,000.

In addition to the capital stock, amounting to \$250,000, mention should be made of an indebtedness by the tap line to its president, who is also president of the Ragley Lumber Company, of nearly \$50,000. The two companies have the same officers.

In addition to the tracks already referred to the lumber company at the time of the hearing had unincorporated logging tracks connecting with the tap line near Pine Hill and extending into the timber. It hauled the logs with its own engines over this track to the incorporated line, and thence under a trackage right for which it paid 25 cents per train-mile, to the mill. The tap line moved the lumber from the mill to the trunk lines, a distance of 10 miles in the case of shipments routed through Timpson, or a distance of 25 miles

on traffic moving through Henderson and over the International & Great Northern. It receives a division of from 3 to 4 cents per 100 pounds from the Houston East & West Texas, and from 2 to 3 cents per 100 pounds from the International & Great Northern. The Texas & Gulf is a part of the Santa Fe system, and has made no allowances to this tap line since 1908; it formerly paid $1\frac{1}{2}$ cents per 100 pounds. The statement made on the hearing was that the timber holdings of the lumber company would be entirely cut out within another year. We are now advised that the lumbering operations of this company will be brought to a conclusion within 60 days. We are also advised that one or two other new independent mills have recently been erected in proximity to this tap line, in which neither the Ragley Lumber Company nor any of its stockholders has any interest.

There are also joint class rates with the trunk lines and some commodity rates, out of which the tap line receives, for example, a division of 23 cents per 100 pounds on cotton destined to Houston and Galveston when moving through Timpson, and 20 cents through Henderson. In the calendar year 1910 it handled 1,029 carloads of lumber, of which 506 carloads belonged to the controlling lumber company. It also handled 15,274 tons of miscellaneous freight, consisting chiefly of grain and grain products, fertilizer, and cotton. It does not file tariffs with the Commission, but is a party to and concurs in tariffs issued by the trunk lines naming joint rates to and from points on its track. It runs one "mixed" train daily in each direction on a regular schedule and its receipts for passenger traffic for the calendar year 1910 are said to approximate \$11,000.

The Timpson & Henderson makes annual reports and claims to keep its accounts in accordance with the rulings of the Commission.

In this case we hold that the connecting carriers may properly allow a division out of the rate on the products of the mill not exceeding, however, 2 cents per 100 pounds.

SHREVEPORT, HOUSTON & GULF RAILROAD.

The Shreveport, Houston & Gulf Railroad Company was incorporated in 1906, and its stock, amounting to \$50,000, is owned by the stockholders of the Carter-Kelly Lumber Company, to which it is also indebted in the sum of \$30,000. The two companies are identical in interest and have the same officers. The tap line runs for a distance of nine miles from a connection with the Texas & New Orleans and Cotton Belt at Prestridge, Tex., to the mill at Manning. It also operates for a distance of one and three-fourths of a mile under trackage rights over the Cotton Belt. The equipment consists of 4 locomotives, 1 passenger coach, 1 combination mail, bag-

gage, and express car, and 32 freight cars. But 3 of the locomotives and 31 flat cars are leased to the lumber company and used by it for the operation of its logging tracks, which aggregate 7 miles in length and extend from the mill into the timber.

The tap line runs two lumber trains daily in each direction, on which passengers, mail, and express matter are handled. Its passenger revenue for the year 1910 was \$2,978.20; its revenue on express matter was \$146.87, and on mail transported, \$384.75. Its freight revenues for the same year amounted to \$21,955.02. Although it participates in joint class rates less than 3 per cent of its freight traffic is supplied by others than the proprietary company. The lumber company itself moves the logs to the mill; and the tap line hauls the lumber from the mill to the trunk lines, receiving from the Cotton Belt a uniform division of 4 cents per 100 pounds and from the Texas & New Orleans 3 and 4 cents per 100 pounds.

The annual reports to the Commission indicate that the tap line had on June 30, 1910, a surplus of \$21,541.67.

Out of the lumber rates the trunk lines may pay to this tap line on the products of the mill of the controlling company at Manning a division of $1\frac{1}{2}$ cents per 100 pounds.

GROVETON, LUFKIN & NORTHERN RAILWAY.

The mills of the Trinity County Lumber Company are at Groveton, Tex., a point on the Missouri, Kansas & Texas Railway, and for many years its logs were brought in over a narrow-gauge track constructed for that purpose and running from the mill southward to the timber. The record indicates that the facilities and service of the trunk line were not entirely satisfactory, and to secure another outlet for its products the lumber company therefore built a standard-gauge road running northward to Vair, Tex., where it joins the Texas Southeastern, another tap line. When completed, the tap line was turned over to a corporation organized in 1908, under the Texas laws, known as the Groveton, Lufkin & Northern Railway Company, capital stock to the amount of \$50,000 and bonds for \$437,000 being issued to the lumber company for the completed road. From Vair to Lufkin the tap line enjoys trackage rights over the Texas Southeastern and as a result is enabled to reach the Houston East & West Texas and the Cotton Belt, which now receive a substantial portion of the output of the mills. The tap line has 1 locomotive, 1 passenger and 1 combination car, 8 box cars, and 21 flat cars.

The lumber company has about 20 miles of unincorporated logging tracks connecting with the tap line about $1\frac{1}{2}$ miles from Groveton. The lumber company hauls the logs over these tracks and over the

tap line to the mill, a distance of about a mile. When lumber is shipped out over the Missouri, Kansas & Texas the tap line switches the cars between the mill and the interchange track, a distance of about 1 mile. The tonnage delivered to the other trunk lines is hauled by the Groveton, Lufkin & Northern about 20 miles to Vair, the terminal of its own rails, and thence over the tracks of the Texas South-eastern a distance of about 13 miles to Lufkin. It receives divisions of from 1 to 5 cents per 100 pounds out of the joint rates on lumber.

The Groveton, Lufkin & Northern claims to have a large outside tonnage. It operates a mixed train daily in each direction between Groveton and Lufkin, and its passenger revenues for the fiscal year 1910 exceeded \$12,000, in addition to which its income from mail and express was about \$1,200. During that year its total freight revenue was \$43,075.72, of which about \$33,000 accrued on traffic furnished by the Trinity County Lumber Company. It hauled during that period 8,175 tons of freight other than lumber, of which 2,422 tons was agricultural products and merchandise, outbound. The volume of its lumber movement for the same period exceeded 52,000 tons.

In this case we find that, on the products of the mill of the controlling company near Groveton, the Missouri, Kansas & Texas may lawfully pay the tap line a switching charge of \$2 per car, and that the other trunk lines may pay divisions out of the rate not exceeding 2 cents per 100 pounds.

MOSCOW, CAMDEN & SAN AUGUSTINE RAILWAY.

The Moscow, Camden & San Augustine Railway Company was incorporated in 1898, and its capital stock, of which \$50,000 has been issued, is owned by W. T. Carter & Brother, a copartnership, the members of which are the officers of the railroad company. The tap line extends from a connection with the Houston East & West Texas at Moscow, Tex., in an easterly direction for 7 miles to the mill of the lumber company at Camden. From that point there is an unincorporated logging track 12 miles in length running to the timber. The tap line has 1 locomotive, 1 passenger car, and 16 freight cars.

The lumber company hauls the logs to the mill. The tap line hauls the lumber from the mill to the trunk line at Moscow, a distance, as heretofore stated, of 7 miles, receiving a division out of the joint rates of from 1 to 4 cents per 100 pounds. The tap line also participates in joint rates with the trunk line on class freight and on grain, the divisions varying from 2 to 12 cents per 100 pounds. There are said to be 1,500 people living within a few miles of Camden who are not connected with the lumber company but use the facilities of the tap line. Camden is a sawmill town with a company store or commissary. The only independent mill served by the line is a shingle

mill which ships three or four carloads a year. About 95 per cent of the traffic of the tap line is supplied by the proprietary company. The freight other than lumber handled by the tap line during the year 1910 amounted to 1,305 tons, but a substantial portion of this freight was consigned to the commissary of the lumber company. A train of four or five freight cars and a coach is run daily in each direction on which passengers are carried, the revenue from that traffic during the year 1910 amounting to less than \$1,000. The tap line has no station buildings, but it is explained that passengers wait for the train in the company store at Camden. Apparently the only facility available for shippers is a loading platform for cotton at Camden.

In this case we are of the opinion that an allowance out of the rate of $1\frac{1}{2}$ cents per 100 pounds may lawfully be paid to the Moscow, Camden & San Augustine on the products of the mill of the proprietary company.

TRINITY VALLEY & NORTHERN RAILWAY.

The Trinity Valley & Northern Railway Company was incorporated in 1906, with a capital stock of \$25,000, which is held by the stockholders of the Dayton Lumber Company. The tap line is indebted to that company in a sum exceeding \$60,000, upon which interest, at the rate of 8 per cent, is unpaid.

The tap line extends from a connection with the Texas & New Orleans Railroad at Dayton, Tex., in a northeasterly direction to Fouts, a distance of 10 miles. There is also an extension of about 8 miles from Fouts which was not yet in operation by the tap line at the time of the hearing, but over which the lumber company was running logging trains. The tap line connects at Fullerton with the Beaumont, Sour Lake & Western, a part of the Frisco system. The equipment consists of 1 locomotive, 1 passenger coach, 7 box and 8 flat cars. Two mixed freight and passenger trains move daily in each direction. The passenger, mail, and express revenue for the year 1910 was \$2,642.70, and of its freight revenue about 10 per cent accrued on traffic supplied by others than the proprietary company.

The mill is at Ladd, about 1 mile from the Texas & New Orleans and nearly 5 miles from the Frisco. The lumber company hauls the logs to the mill over unincorporated tracks that are laid and maintained for it and at its expense by the tap line and over a portion of the incorporated line under a trackage right for which it pays the tap line \$1 per train-mile. The tap line moves the carloads of lumber from the mill to the Texas & New Orleans, a distance of less than a mile, or 5 miles to the Frisco. Divisions are allowed by both trunk lines, the average being about $2\frac{1}{2}$ cents per 100 pounds. This was so stated on the hearing.

The lumber company moved to its mill during the year 1910 about 32,000 tons of logs and shipped out about 20,000 tons of lumber. About 8,000 tons of ties, stave bolts, and wood were handled for outside shippers during the same period, as is claimed. There are no other mills on the tap line, although there are one or two tie camps and a few farms.

The tap line makes annual reports to the Commission, from which it appears that on June 30, 1910, there was an accumulated surplus of \$4,886.08.

In this case we think that, with respect to the products of the mill of the lumber company, any division out of the rate to the tap line in excess of 1 cent per 100 pounds would be unlawful. We fix that as the maximum.

TRINITY VALLEY SOUTHERN RAILROAD.

In 1898 the Columbia Lumber Company built 6 miles of track from its mill at Oakhurst, Tex., westward to a connection with the International & Great Northern Railroad at Dodge, Tex. This track was known as the Trinity Valley Railroad until 1901, when the Trinity Valley Southern Railroad Company was incorporated. At that time the Palmetto Lumber Company, having some timber interests in the vicinity, had a sawmill at a point known as Palmetto, within 2 miles of the tap line with which it was connected by a private track. In the year 1909 A. C. Ford, president of the Palmetto Lumber Company, and W. S. Gibbs, a banker at Huntsville, Tex., purchased the timber and mill of the Columbia Lumber Company, together with the railroad property known as the Trinity Valley Southern. Title to the latter was taken by Gibbs, who had no stock in the Palmetto Lumber Company, but held its bonds to the extent of \$200,000. It is said that these bonds were liquidated by the Palmetto Lumber Company shortly prior to the hearing in exchange for timber holdings in another part of the state, which it turned over to Gibbs. The mill and timber acquired from the Columbia Lumber Company was taken in the name of the Palmetto Lumber Company. The officers of the Palmetto Lumber Company are officers of the tap line, and the tap line is operated primarily as a facility of the Palmetto Lumber Company. It may be well to add that the record indicates that the lumber company originally purchased its timber holdings from Gibbs. The capital stock, as shown on the annual report to the Commission, is \$20,000. The record, however, mentions the capitalization as \$200,000.

The mill of the Palmetto Lumber Company is at Oakhurst, a company town with a commissary, 6 miles from the trunk line. The lum-

ber company has unincorporated tracks aggregating in length about 20 miles, connecting with the tap line at various points and extending into the timber. One or more of these tracks run directly from the mill into the timber. The lumber company hauls the logs to the mill with locomotives and cars which it owns and operates. The service performed by the tap line is limited to the movement of lumber, in cars furnished by the trunk line, from the mill to the junction point, Dodge. For this purpose it operates a daily train in each direction, in which there is a combination passenger and baggage car carrying passengers, express matter, and the mails. The tap line has two locomotives, but no freight cars of any description.

The divisions allowed by the trunk line out of the rates on yellow-pine lumber vary from 2 to 5 cents per 100 pounds, being 30 per cent of the total proportion accruing to the International & Great Northern. Out of joint class and commodity rates that are in effect with the trunk line to St. Louis and Kansas City, the tap line receives a division of 10 per cent.

The annual report to the Commission for the year ending June 30, 1910, indicates a movement of 27,288 tons of lumber and forest products, all of which was apparently supplied by the Palmetto Lumber Company. There were 2,964 tons of other freight, of which 210 tons moved outbound, and the remainder came in. Apparently a substantial proportion, if not all, of the inbound tonnage was merchandise and supplies used by the lumber company, its commissary, or its employees. The revenues from passengers for the same year amounted to \$1,330, and from mail and express matter, \$685.92. There was a small profit from the operation of the road for that year which, added to the surplus from previous years, enabled it to pay a dividend of \$2,000 and have a net surplus on June 30, 1910, of \$3,311.28.

The officers of the tap line, who are officers also of the lumber company, receive and use free passes over the trunk lines.

We fix 1 cent per 100 pounds as the maximum division that may lawfully be paid out of the rate to this tap line on the products of the mill of the controlling company.

CARO NORTHERN RAILWAY.

The Caro Northern Railway Company was incorporated on September 15, 1906, under the laws of Texas. It is controlled by the stockholders of the Saner-Whitman Lumber Company, through the ownership of practically the entire capital stock, amounting to \$100,000. There are no bonds. The president and general manager of the railroad are also officers of the lumber company.

It extends from a connection with the Texas & New Orleans Railroad at Caro, Tex., in a general northerly direction about 18 miles to Mount Enterprise. The equipment consists of 2 locomotives, 1 passenger car, and 2 box cars. The lumber company owns separate equipment, consisting of locomotives and logging cars.

The mill of the lumber company is located at a point called Wydeck, about one-half mile from the junction. There are also a number of sawmills and cotton gins along the line.

The tap line operates one mixed train in each direction daily on regular schedule, and handles passengers, mail, and express. The passenger revenue for the last fiscal year was about \$1,700. For the year ending June 30, 1910, the total traffic handled was 1,348 carloads of lumber, of which 897 cars were supplied by the controlling interests and 451 cars by others, and 294 carloads of traffic other than lumber, of which 98 cars were supplied by the controlling interests and 196 cars by others.

The lumber company hauls the logs from the loading point on the logging spurs to the mill under trackage rights over the tap line, for which it pays the tap line \$4 per train for the round trip, which amounts to approximately $33\frac{1}{2}$ cents per car for the average train of 12 cars. On lumber shipments, the tap line handles the empty and loaded cars between the mill and the junction, a distance of six-tenths of a mile. For outbound shipments of lumber, bills of lading and waybills are issued by the agent of the tap line at Wydeck.

It receives divisions from the Texas & New Orleans on lumber of from three-fourths of a cent to 3 cents on interstate business, and from three-fourths of a cent to 4 cents on state business. On through class rates applying to and from points on the tap line, the tap line receives $12\frac{1}{2}$ per cent of the St. Louis or Missouri River rate, which amounts to from 2 cents to $2\frac{1}{2}$ cents per 100 pounds.

The annual report for the year 1910 shows a total freight revenue of \$21,085.31; passenger, \$1,538.18; mail, \$499.44; express, \$458.28; it received from the lumber company for trackage rights, \$1,481.50; or a total operating revenue of \$25,062.71. The operating expenses were \$24,443.55 and the net operating revenue \$619.16. The payment of taxes and hire of equipment caused a net corporate loss of \$2,702.16, but there was an accumulated surplus from previous operation of \$7,601.35, which left a surplus June 30, 1910, of \$4,899.19.

The only service performed by this tap line in handling the products of the mill of the controlling company is to switch the lumber from the mill to the trunk line, a distance of one-half mile. The divisions now received by it are altogether excessive. From no point of view may this allowance lawfully exceed a reasonable switching charge, which we think should not exceed a maximum of \$2 a car.

BUTLER COUNTY RAILROAD.

The Butler County Railroad Company is owned by the Brooklyn Cooperage Company, while most of the timber land which it reaches is owned by the Great Western Land Company. All are subsidiary corporations of the American Sugar Refining Company, the cooperage company manufacturing chiefly sugar barrels. The railroad company was incorporated in September, 1905, and its capital stock issued and outstanding amounts to \$163,500, issued for the tracks and equipment which it then acquired from the cooperage company. It is also indebted to the cooperage company in the sum of \$50,000.

The tap line is in two disconnected sections. One connects with the Iron Mountain and the Frisco at a point in or near Poplar Bluff, Mo., known as Linstead, and extends to and into the plant of the cooperage company which is within three-fourths of a mile of the two trunk lines. The other section is the principal track of the tap line and connects with the Iron Mountain at Lowell Junction, about $7\frac{1}{2}$ miles from Poplar Bluff, running thence southward about 7 miles to a point known as Baileys, with a branch about 3 miles in length connecting with the main stem at Rossville. At Baileys a connection is made with the unincorporated tracks of the cooperage company that run through its timber and are used largely in logging operations. Over a considerable portion of this unincorporated track the tap line has a trackage right. It also enjoys the privilege of running its trains over the Iron Mountain from Lowell Junction to Poplar Bluff, for which it pays 65 cents a train-mile for 25 cars. The equipment consists of 2 locomotives, 2 passenger coaches, 3 cabooses, and about 100 freight and log cars.

The timber is all hardwood and the logs are loaded on the cars by the employees of the cooperage company and hauled by its locomotives to a connection with the track of the tap line. The tap line then hauls the cars over its own rails to Lowell Junction, then over the Iron Mountain to Linstead and over its own track for a fraction of a mile to the mill, where they are unloaded by the cooperage company. A charge of 1 cent to $1\frac{1}{2}$ cents per 100 pounds, amounting approximately to \$4 per car, is made by the tap line against the cooperage company for the log movement to the mill, being the regular manufacturing rate under the Missouri distance tariff. The tap line switches the loaded cars from the mill to the tracks of the Frisco or Iron Mountain, a distance in each case of less than 1 mile. It receives from the trunk lines an allowance of from 2 to 5 cents per 100 pounds. The rates from points on the tap line, including the mill at Linstead, are in all cases 2 cents higher than the rates of the trunk lines from Poplar Bluff, excepting to New Orleans and New York,

where the most of the cooperage company's shipments actually move; to those points the Poplar Bluff rates apply from points on the tap line.

The traffic of the Butler County Railroad for the fiscal year ending June 30, 1910, was chiefly forest products, amounting in the aggregate to 184,688 tons, as against 2,475 tons of other freight. Of the first figure, 107,527 tons was logs and cooperage material, furnished by the controlling interests; 77,161 tons of logs, bolts, piles, ties, and lumber were moved for outsiders, but all of the timber came from lands of the Great Western Land Company. The 2,475 tons of miscellaneous freight included 1,195 tons of inbound machinery and coal for the proprietary companies. The passenger revenue for the same year was \$4,104.22. The tap line operates three mixed trains in each direction daily between Linstead, where the plant is located, and Melville, a point on the unincorporated track south of Baileys. Two of these trains are said to be used principally for passenger business.

There are several independent industries on the tracks of the Butler County Railroad near Poplar Bluff or Linstead which secure their timber material from the Great Western Land Company, the tap line switching their product to the trunk lines. These industries lease their factory sites from the cooperage company; and the admission appears of record that the leases were made for the purpose of securing the traffic to the tap line so that it would obtain divisions thereon. There are also a few independent producers of ties, handle bolts, etc., that team their logs to the sawmills and ship out their products over the main track of the tap line into Lowell Junction. But such shippers pay either the local rate of the tap line in addition to the charge of the trunk line or pay a through rate that is 2 cents higher than the rate from Poplar Bluff.

This is a striking example of the advantages that an industry can get out of a tap line that it owns and holds out as a common carrier. The sugar company, as is well known, has important refining establishments at New Orleans and New York, and it is to its interests to have all the hardwood along the Butler County Railroad made available to it. The rates to New York and New Orleans are therefore so adjusted as to induce movements to those points and restrict movements to other points.

For its service in moving the products of the cooperage company's mill to the Iron Mountain and to the Frisco, a distance of less than 1 mile, this tap line may lawfully receive out of the rate nothing beyond a reasonable switching charge, which we fix at \$1.50 per car.

DEERING SOUTHWESTERN RAILWAY.

The Deering Southwestern Railway Company is owned by the International Harvester Company and is operated in connection with the mill of its subsidiary corporation, the Wisconsin Lumber Company, at Deering, Mo. The officers of the Deering Southwestern are officers of other industrial or terminal lines owned by the Harvester Company. The tap line was incorporated in 1903, and has issued capital stock to the amount of \$400,000. There have been one or two amendments to its charter, authorizing the building of extensions.

The Deering Southwestern, as in operation on the date of the hearing, connected with the Frisco at a point known as Deering Junction, and extended in a southwesterly direction for about 11 miles to Converse. It had 5 locomotives, 1 passenger car, 1 combination car, 1 caboose, 22 freight cars, and 66 logging cars. The lumber company itself owned a number of miles of unincorporated logging spurs connecting with the tap line, together with 1 small locomotive and a log loader.

Since the hearing extensions have been completed and put in operation, as the Commission is advised, so that its line now extends from Deering eastward a distance of nearly 14 miles, crossing the Frisco at Blazer and ending at Caruthersville, on the Mississippi River, where a junction is effected with another branch of the Frisco. The original line from Deering to Converse has been extended to Hornersville, a point on the Cotton Belt. The aggregate length of the tracks as thus extended is about 31 miles. Citizens of the town of Caruthersville donated the land for the terminals at that point.

The line as operated at the date of the hearing reached no towns and served no industries other than the proprietary company. The track as extended reaches several towns; and it is claimed that more or less outside tonnage is being developed.

The mill of the lumber company at Deering is about half a mile from the track of the Frisco; and the lumber company also has two small mills down in the timber. The logs are loaded by the lumber company and moved by it to the junction of the spurs with the main track of the tap line; from that point they are taken by the tap line to the mill, at a rate of \$1 per 1,000 feet, which is equivalent to 1 cent per 100 pounds, charged up against the lumber company. At the time of the hearing the tap line switched the lumber to the Frisco at Deering Junction. But with the extension of the track the plan contemplated was the delivery by the tap line of the lumber of the proprietary company at Blazer, 7 miles east of the mill. We are given to understand that the operating conditions of the branch of the Frisco connecting with this tap line at Deering Junction are

such as to make it no longer practicable to receive the lumber at that point.

At the time of the hearing it was admitted that practically the entire tonnage of the tap line was supplied by the controlling interests, and no passengers were carried. It has subsequently opened a passenger service between Caruthersville and Hornersville; but no figures are given of record. The tap line files annual reports with the Commission and keeps its accounts in accordance with the method prescribed by the Commission.

The only rates published by the Frisco in which the tap line participates apply on lumber and forest products, and the allowance out of those rates to the tap line is uniformly 2 cents per 100 pounds. This is the same as the so-called local rate which it publishes from the mill to the junction point, a distance of one-half mile.

For its service in hauling the products of the mill of the controlling company to the Frisco at Blazer, a distance of 7 miles, we fix 1½ cents as the maximum division that may lawfully be paid to this tap line out of the rate; we fix the same maximum as the division that may lawfully be paid by the Cotton Belt on traffic delivered to it at Hornersville.

GIDEON & NORTH ISLAND RAILROAD.

The track operated by the Gideon & North Island Railroad Company connects at Malden, Mo., with the Frisco and Cotton Belt and extends in a southeasterly direction through Gideon, 8 miles distant, where it joins the Frisco, to a point known as North Island, a distance of about 21 miles. There are also about 10 miles of sidetracks and spurs and a short branch track which will be mentioned later. The tap line owns the spurs and sidings and 9 miles of its main track. But 7 miles, extending from Malden southward through Five Points, is leased from the Gideon-Anderson Lumber & Mercantile Company, and 5 miles, extending southward out of Gideon, are leased from the United States Cooperage & Handle Company. As a matter of fact, the three companies are substantially one in interest, the stockholders of the Gideon-Anderson Company owning a majority of the stock of the tap line; and stockholders of the cooperage company owning the minority. The president of the Gideon-Anderson Company is president of the tap line and owns about 52 per cent of the stock of the cooperage company. The tap line was incorporated in April, 1908, at which time the 12 miles of track which it leases from the controlling companies were laid and in operation, those tracks having been constructed subsequent to 1904 as plant facilities for the purpose of hauling logs to the mills. The additional mileage operated by the tap line was constructed by it after its incorporation.

The leases of track to the tap line will expire in 1918; and the consideration is stated as 4 per cent on the estimated value of the track, with the privilege to the tap line of purchasing the property at a stipulated valuation at the expiration of the term. One of the conditions is that the tap line shall build the necessary logging spurs, each not exceeding 2 miles in length, and shall load the logs on the cars and transport them to the mills. The tap line owns two log loaders. It has 3 locomotives, 12 flat cars, and about 30 logging cars. It leases 40 logging cars from the controlling companies. It formerly also leased several locomotives, which were later sold by the lumber companies.

The Gideon & North Island enjoys trackage rights over the Frisco for a distance of over 40 miles between Gideon and Wardell. Under these rights it hauls logs to the mill at Gideon, paying the Frisco 50 cents per 1,000 feet, for the use of the tracks.

The mill of the Gideon-Anderson Company is reached by the tracks of the Frisco at Gideon, while the mill of the United States Cooperage Company is within a few hundred feet of the Frisco rails in Malden. The tap line loads the logs and hauls them to the mills, making a charge of $1\frac{1}{2}$ cents per 100 pounds against the lumber companies. It switches the lumber from the mill at Malden for a distance of about one-quarter of a mile to the interchange track from which they are taken by the Frisco. The Frisco itself occasionally takes the cars directly from the mill at Gideon; but they are usually switched by the tap line. It allows the tap line a division of 2 cents per 100 pounds out of the rates to Memphis, and 3 cents out of the rates to other territory, all of the rates as published from points on the tap line being 1 cent higher than the rate of the Frisco from the junction point. These rates and allowances relate only to hardwood lumber, staves, and heading. There are no joint rates or divisions on other commodities or on class traffic; and no allowances are received from the Cotton Belt, which apparently gets very little, if any, of the traffic.

There is a small independent sawmill about four miles from Gideon and another on the line between Gideon and Malden. Another small mill at a point known as O'Neill is reached by a spur track about 1 mile in length connecting with the tap line at Five Points. It formerly teamed its lumber to the tap line, but with the construction of the spur track its lumber is moved by the tap line at a charge of 4 cents per 100 pounds over the rate from Malden. The capacity of the independent mills is not stated of record. But apparently 95 per cent of the entire tonnage of the tap line is supplied by the controlling companies. The traffic for the year ending June 30, 1910, aggregated 103,017 tons, of which all but 1,239 tons were

forest products. The tap line carries neither passengers, mail, nor express matter. Two logging trains are run over the road daily.

It first filed an annual report with the Commission for the year ending June 30, 1910, and this report showed a net surplus of \$8,125.51. The operating revenues in that year aggregated \$52,283.31, and the operating expenses were \$24,680.85. It expended out of its net earnings more than \$17,000 for constructing new tracks, being apparently logging spurs, and paid for the lease of tracks \$1,720.

This tap line comes clearly within the class of cases described in the original report, and is not entitled to any allowance from the trunk lines for the services which it performs for the controlling lumber companies or on their product.

MISSISSIPPI VALLEY RAILWAY.

The track of the Mississippi Valley Railway Company crosses and connects with the Frisco system at Steele, and extends from that point westward about 6 miles to Dolphin, and eastward over 9 miles to Tyler, on the Mississippi River. The hardwood mill of the Tyler Land & Timber Company, which owns practically the entire capital stock of the tap line, is at Tyler. The tracks and equipment, together with the mill and timber, were all purchased by the lumber company in 1904 from prior owners, and the tap line corporation was then formed. It has 2 locomotives, a combination car, and about 40 logging cars. It has no agents or clerks, its books being kept for it by employees of the lumber company.

The tap line hauls the logs from the point where they are loaded on the spurs in the woods to the mill, charging the lumber company \$5 per car. Some logs are floated down the river to the mill. The tap line moves the lumber from the mill to the Frisco, a distance as heretofore stated of 9 miles, and receives an allowance of 2 cents per 100 pounds. It publishes no tariffs and has no rates on miscellaneous freight, but customarily charges 10 cents per 100 pounds on less than carload shipments, and on grain, cottonseed, and cotton charges from \$5 to \$10 per car, depending on the loading point.

The tap line is said to pass through a good farming country, the population of which is about 2,000, with a number of cotton gins and some country stores. The traffic for the fiscal year 1910 aggregated 87,245 tons, practically all of which was logs and lumber, and of which 40,434 tons was handled for the proprietary company. It also carries passengers on its logging and lumber trains, which run at irregular times, its revenue from passengers and the mail aggregating \$3,571.20 for the year 1910.

Although the tap line has been receiving allowances for several years, at the date of the hearing it had not filed any annual report, but has since submitted its report for the year 1911.

With respect to the product of the mill of the proprietary company we should regard any allowance in excess of $1\frac{1}{2}$ cents per 100 pounds as unlawful.

PARAGOULD & MEMPHIS RAILWAY.

The track of the Paragould & Memphis Railway Company connects with the Cotton Belt at Cardwell, Mo., and extends from that point through Paulding, Mo., where it connects with the Frisco, and thence to Manila, Ark., where it interchanges some traffic with the Jonesboro, Lake City & Eastern, with which, however, it has no physical connection. There is a short branch extending from Cardwell to a point known as Fort Scott, Ark. The length of the tap line aggregates about 27 miles. Its book valuation is \$220,000, or more than \$8,000 per mile. There are station buildings at Cardwell and Manila, and it uses the Frisco depot at Paulding. The tap line has 2 locomotives, 1 passenger car, 1 caboose, and 53 freight cars; 20 of the freight cars are owned, however, by the Cardwell Mill & Lumber Company. The tap line has 3 station agents, 2 train crews, and 14 trackmen.

The Paragould & Memphis Railway Company was incorporated in 1902, with an authorized capital stock of \$525,000, of which \$60,000 has been issued. A majority of the stock is owned by members of the Vail family, who own stock in five manufacturing companies served by the tap line, namely, the Decatur Egg Case Company, Cardwell Stave Company, Buffalo Stave Company, Paulding Stave Company, and Indiana Stave Company. The tap line has also executed a first mortgage in favor of a bank, securing a loan of \$25,000, and a second mortgage for \$90,000, on which the interest is unpaid, in favor of the Decatur Egg Case Company. The Egg Case Company is no longer in active business, but owns considerable land and timber on the tap line or in its vicinity. At the time of the incorporation nine miles of the track was already in operation, being owned by the Egg Case Company, and turned over by it to the tap-line corporation in exchange for stock.

It is claimed that the tap line hauls very few logs for the mills of the Vail interests, which obtain their principal supply by wagon from timber from off the tap line. A considerable quantity of logs is hauled by the tap line, however, for independent mills at a charge of \$1.75 and \$2 per 1,000 feet, log scale, which is equivalent to $1\frac{1}{4}$ and 2 cents per 100 pounds. These are net rates made on the understanding that the tap line shall haul the manufactured product.

The product of the mills at Cardwell is hauled a distance of about 1 mile to the Cotton Belt, or 4 miles to the Frisco. The product of the mills at Paulding is apparently switched a short distance to the Frisco or moves about 5 miles to the Cotton Belt at Cardwell. Such traffic as is interchanged with the Jonesboro, Lake City & Eastern is drayed from one track to the other at Manila, the expense being jointly borne by the two companies.

The claim is that only 25 per cent of the traffic of the tap line is supplied by the controlling companies. It hauled during the fiscal year 1910, 75,470 tons of forest products, and also 596 tons of agricultural products moving outbound, in addition to which 404 tons of coal and 1,819 tons of supplies and miscellaneous material came in. During the same period the passenger earnings aggregated \$1,553.98. There was a net surplus on June 30, 1910, of \$19,727.94, which had been expended, however, in betterments. No dividends have been paid.

In this case we think the allowance on the products of the mills of the Mayo companies should not exceed a reasonable switching charge, which we fixed at \$3 per car on the product of the mills at Paulding and Cardwell when delivered to the trunk lines at Cardwell and Paulding, respectively, and \$2 per car when delivered to the nearest trunk line.

POPLAR BLUFF & DAN RIVER RAILWAY.

The Poplar Bluff & Dan River Railway Company was organized in February, 1906, with a capital stock of \$50,000, practically all of which is owned by Mr. H. I. Ruth, its president, who is also president and treasurer of the Hargrove-Ruth Lumber Company. The two companies are identical in interest; and the mill, timber, and railroad were acquired by the present owners at a receiver's sale. Moreover, the tap line previous to its incorporation was privately operated by the lumber company as a facility of the mill.

The track connects with the Iron Mountain at Poplar Bluff, Mo., and extends for a distance of 22 miles southward to Ruthville. The tap line has 2 locomotives, and 6 cars, not equipped with safety appliances. Practically the entire tonnage is supplied by the proprietary company, the only exception being a few stove bolts and ties shipped by small producers. The tap line owns the logging spurs and performs all service necessary in delivering the logs to the mill, setting up a charge of \$1 per 1,000 feet against the lumber company. The lumber is loaded at the mill into cars standing on the tracks of the Iron Mountain. The tap line receives, however, a division of 4 cents per 100 pounds out of the joint rates, which includes an arbitrary of 2 cents per 100 pounds added to the rates in effect from the junction point.

On June 30, 1910, the tap line had a surplus of \$19,000, the revenues for the year ending on that date having exceeded the expenses by nearly \$10,000. It does not file annual reports with the Commission.

It is frankly stated by counsel on the record that the methods and practices of the Poplar Bluff & Dan River have been irregular; and his client voluntarily announced a willingness to relinquish all claim to receiving divisions as a common carrier. In fact, the witness, until required by the Commission to do so, refused to testify on the ground of self-incrimination. We hold that no allowance out of the rate may lawfully be made in this case.

SALEM, WINONA & SOUTHERN RAILROAD.

The Missouri Lumber & Mining Company owns about 19 miles of track connecting with the Frisco at a point known as Winona Junction, Mo., and extending in a northerly direction to a point known as Horse Hollow. It also owns 2 locomotives, 2 coaches, a caboose, 2 box cars, and 50 flat cars. About 13 miles of the track, from Winona Junction to a point known as West Eminence, and all of the equipment are leased by the lumber company to a separate corporation which it caused to be incorporated in 1908, and which is owned by its stockholders, known as the Salem, Winona & Southern Railroad Company. The annual rental is \$12,000, or about 8 per cent on the estimated value of the property. The lease in terms apparently does not cover the 6 miles of track between West Eminence and Horse Hollow, but the tap line also operates that portion of the track. The entire line was originally constructed by the lumber company as a facility for its mill, then located at Grandin, Mo., on what is now the Current River branch of the Frisco, over which the lumber company had trackage rights for its logging trains. The plant at Grandin was subsequently abandoned and the lumber company built a new mill at West Eminence. The tap line enjoys trackage rights over the Frisco for a distance of about two and a half miles between Winona Junction and Winona. There is a small station building and track scales at West Eminence.

The lumber company loads the logs on the cars and with engines which it owns and operates hauls them over the track from Horse Hollow to the mill at West Eminence. The tap line moves no logs to the mill. It hauls the lumber from the mill to Winona, a distance of over 15 miles, where it delivers them to the Frisco, which allows a division of from 1 to 4 cents per 100 pounds. On shipments that move to points where no joint rates and divisions are published the tap line makes a charge of 4 cents per 100 pounds in addition to the rate of the Frisco from Winona.

The tap line moved 53,101 tons of forest products of the proprietary company during the fiscal year 1910 and 3,006 tons for others. It is stated that there is one small independent mill on the line and another about three miles from Horse Hollow, which teams its lumber to that point for shipment. The miscellaneous freight included 5,310 tons supplied by the controlling company and 3,145 tons which is said to have been furnished by outsiders. It will be seen therefore that the proprietary company furnishes nearly 90 per cent of the traffic. During the same year the passenger earnings aggregated \$5,302.49 and the receipts from the carrying of the mails were \$822.86. The tap line claims to run two "mixed trains" daily, in each direction on a regular schedule, their principal load being lumber.

It is admitted on the record that the tap line was incorporated for the purpose of securing divisions out of the rates and trackage rights from the Frisco. It has capital stock amounting to \$150,000; but the tap line owns neither track, right of way, nor equipment, and the record does not state what proceeds, if any, were realized from the issuance of the stock.

In this case we find that any division to the tap line out of the rate on the products of the mill of the proprietary lumber company in excess of $1\frac{1}{2}$ cents per 100 pounds would be unlawful.

FERNWOOD & GULF RAILROAD.

The Fernwood & Gulf Railroad Company was incorporated in 1906 and has capital stock issued and outstanding to the amount of \$10,000, together with bonds aggregating \$125,000. It is identical in interest with the Fernwood Lumber Company, the stockholders being common and holding shares in the same proportion.

Some years ago the lumber company built a private logging road, laid with wooden rails, over which cars were drawn by horse or mule power. Later one or more small locomotives were acquired and the wooden rails were replaced by 25 and 30 pound steel. When the timber in that vicinity was cut out the track was moved to a different location in order to reach other timber and heavier rails were substituted. About 21 miles were laid and in operation when the tap line was incorporated; and an agreement was drawn up under which this track was thereafter operated for a period of three years by the tap line. At the end of that period the lumber company sold this track for the sum of \$125,000 to the tap line, reserving, however, the privilege of operating logging trains thereon without charge. In 1909 about 9 miles of additional track were laid at a cost of \$135,000.

The tap line, as described on the record, consists of about 33 miles of track connecting with the Illinois Central at Fernwood, Miss..

running southeastward to Tylertown, on the New Orleans Great Northern, and thence northeastward to a point one mile beyond Kokomo. There are also about six miles of switch tracks in the vicinity of the mill at Fernwood, which are owned and operated jointly by the Illinois Central, the tap line, and the lumber company. The lumber company has several miles of logging tracks connecting with the tap line and extending into the timber. The equipment of the tap line consists of a baggage car, 2 combination passenger cars, and 19 freight cars. It owns no locomotives, but leases one from the lumber company. There are several stations on the line and it has one train crew, a number of section men, and other employees.

The tap line was built through virgin timber owned largely by the proprietary company. Its traffic is chiefly lumber and other forest products, of which 60,374 tons moved during the year ending June 30, 1910, the total freight movement in that year being 79,041 tons. The traffic included 1,477 tons of naval stores, 579 tons of coal, 5,661 tons of agricultural products, and 10,950 tons of miscellaneous supplies and merchandise. It is asserted that only 63 per cent of the tonnage was supplied by the proprietary company. The revenues from freight traffic during the same year were \$53,507.82; and the earnings from passenger, mail, and express aggregated \$12,798.61.

The mill of the Fernwood Lumber Company is several hundred feet from the right of way of the Illinois Central at Fernwood. The logs are hauled to the mill by the lumber company, under the free trackage right heretofore referred to. The empty and loaded cars for lumber shipments are switched from the mill to the Illinois Central, sometimes by the lumber company, sometimes by the tap line, and at other times by the Illinois Central itself. In all cases, even when the Illinois Central itself switches the car, an allowance of 2 cents per 100 pounds is paid to the tap line by the Illinois Central out of the rates in effect from Fernwood. On the shipments made by small independent sawmills served by the tap line the rates charged are 2 cents per 100 pounds higher than the rate from the junction point, and the tap line receives from the Illinois Central 4 cents per 100 pounds. A part of the output of the Fernwood mill is moved by the tap line to Tylertown, and there delivered to the New Orleans Great Northern, which makes an allowance of 2 cents per 100 pounds. That trunk line pays a division of 3 cents on lumber shipped by other mills on the tap line.

In this case we hold that the Illinois Central may lawfully pay the tap line a switching charge of \$2.50 a car when it handles the products of this mill to its rails; the New Orleans Great Northern may lawfully allow it a division out of the rate of 2 cents per 100 pounds.

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KENTWOOD & EASTERN RAILWAY.

The Kentwood & Eastern Railway Company is owned by the stockholders of the Brooks-Scanlon Lumber Company. The two companies have the same officers, whose salaries, aggregating \$20,000 per year, are prorated between the companies in the proportion of their capital stock. The tap line was incorporated in 1905; its capital stock amounts to \$100,000; and it is indebted to the lumber company in the sum of \$220,000, on which it pays interest.

The lumber company has two mills, both at Kentwood, La., one directly adjacent to the right of way of the Illinois Central Railroad and the other only 400 feet distant therefrom. Both are reached by sidetracks connecting with the Illinois Central.

The tap line has a track about 3 miles in length, extending from Kentwood eastward to a point known as Bolivar Junction, about 2 miles of which it does not own but leases from the lumber company. This track has a third rail, enabling the tap line to operate standard and narrow gauge trains over it. From Bolivar Junction a narrow-gauge track laid with 35 and 40 pound steel and running uphill and down dale extends eastward for over 25 miles, crossing the New Orleans Great Northern Railroad at Warnerton and terminating at a point known as Hackley. The construction of this track was apparently begun as long ago as 1896 by another lumber company; and it was completed about 1904. Subsequently the Brooks-Scanlon Company purchased the track for the sum of \$112,000, as well as the timber and the mill of the former owner, the price paid for the mill being \$50,000. It has retained the ownership of the track from Bolivar Junction to Hackley, and leases it to the tap line for a rental of \$10,000 per annum, plus the taxes. From Bolivar Junction the tap line has another track, referred to as the standard-gauge division, extending southward for a distance of about 23 miles to Foley. This is laid with 56-pound steel and traverses a level country. It was constructed in 1906. The tracks operated by the tap line aggregate over 50 miles in length; but it owns only one-half of the mileage of the main track. It has 4 standard-gauge and 5 narrow-gauge locomotives, 6 passenger cars, 4 cabooses, 48 box cars, 9 work cars, 52 log cars and 182 flat cars; of this number 252 are narrow gauge and 51 standard gauge. The lumber company also has a number of miles of logging tracks connecting with the incorporated line and extending into its timber. It also owns one locomotive and a number of cars. An independent manufacturer, the Bassfield Lumber Company, has a short unincorporated logging road connecting with the tap line about 2 miles west of the junction with the New Orleans Great Northern. There are said to be several small towns or settlements along the tap line, and it has

stations at three points, with "pagodas" or sheds to shelter passengers at one or two other points. It is claimed that there are 32 small sawmills along the line, only one of which has any relation to the Brooks-Scanlon Company, and that their average output is from 15,000 to 40,000 feet of lumber daily. There are 6 turpentine stills, 4 of which are owned by the proprietary company, as is admitted, and also 17 cotton gins, together with a number of farms in the vicinity of the tap line. The tap line has a daily train for logs and passengers on the standard-gauge division, and two in each direction daily on the narrow-gauge division; with two such trains between Kentwood and Bolivar Junction. The passenger revenue for the year 1910 aggregated \$13,684.60, and the earnings from mail and express aggregated \$2,521.37. Its revenue from freight traffic for the same year amounted to \$193,624.41. It handled 281,030 tons of lumber and other forest products, of which about 83 per cent was supplied by the proprietary company. It also moved 7,378 tons of coal inbound, and moved outbound 3,134 tons of agricultural products and 3,043 tons of naval stores. The merchandise and miscellaneous supplies aggregated 6,981 tons. Of all this miscellaneous freight other than forest products a substantial portion was handled for the controlling interests or their employees.

The logs are loaded on the cars by a firm of logging contractors, which constructs and maintains the spurs and delivers the cars at the junction with the incorporated line. The tap line sets up against the lumber company a charge of $2\frac{1}{2}$ cents for a haul of 15 miles, and 3 cents for hauls in excess thereof, for the movement of the logs to the mill. The Illinois Central allows a division of from $2\frac{1}{2}$ to 4 cents per 100 pounds out of the rates, which are higher from points on the tap line than from the junction point. The net earnings of the Illinois Central, however, are less than its published rates from Kentwood. The record is not altogether clear respecting the amount of the divisions. But apparently when the lumber moves out over the Illinois Central and the allowances are paid, the tap line refunds to the lumber company the revenue which it has received as a division from the Illinois Central. The practical result seems to be that the lumber company has its logs hauled to the mill free of charge or at very low cost. As heretofore stated, the lumber is taken from the mill by the Illinois Central. None of the lumber from the proprietary mills moves out over the New Orleans Great Northern.

On shipments of lumber moving from the independent mills heretofore referred to, the tap line does not haul the logs but receives from the Illinois Central the same divisions as are paid on the lumber shipped by the Brooks-Scanlon Company. The tap line makes annual reports to the Commission, which show a net surplus on June

30, 1910, of \$127,936.04. No dividends have been paid. Seventy-five per cent of the revenue accrues on the traffic of the lumber company.

One of the mills of the proprietary company is directly on the line of the Illinois Central and the other but 400 feet from it. The service on the products of the mill is performed by the trunk line and not by the tap line. Allowances out of the rate by the Illinois Central to the tap line under such circumstances we would regard as an unlawful concession out of the rate to the proprietary company.

KENTWOOD, GREENSBURG & SOUTHWESTERN RAILROAD.

The Kentwood, Greensburg & Southwestern Railroad Company is controlled by the shareholders of the Amos Kent Lumber & Brick Company, who own practically the entire capital stock. That company in turn is subsidiary to the F. C. Denkmann Company, which also controls the Natalbany Lumber Company and its tap line, the New Orleans, Natalbany & Natchez, hereinafter described.

The Kentwood, Greensburg & Southwestern connects with the Illinois Central at Kents Mill, near Kentwood, La., and extends in a westerly direction for about 16 miles to Freiler. The track is narrow gauge, laid with 35 and 40 pound steel. Beyond the terminus the lumber company has an unincorporated track; it also has logging spurs connecting with the tap line at various points and extending into the timber. The tap line has 7 locomotives, 3 of which are leased to and used by the lumber company, and 2 so-called passenger cars, which are, in fact, rebuilt cabooses. There are also about 70 freight or logging cars.

The construction of the tap line was begun as long ago as 1850, and it was completed to Freiler in 1904. Apparently it was operated as a private facility of the mill. In any event it was not incorporated until 1906, after it had been purchased by the Denkmann interests at a cost of \$100,000 from the prior owners, who also conveyed the mill and timber. Its authorized capital stock was fixed at \$350,000, of which \$100,000 was issued. The tap line owes the lumber company nearly \$50,000.

The Amos Kent Company has a sawmill on the tracks of the Illinois Central at the junction point, where it also has a brick plant and commissaries and stores. There are said to be four other small sawmills along the tap line, which obtain their logs by means of drays, one of which is served by a spur track about 600 feet in length connecting with the tap line. One or two small towns, each having a population of less than 300, are reached by the tap line, which has a station and an agent at Freiler, and one also at the junction point.

The logs are hauled to the mill of the proprietary company by the tap line from the loading point, and are dumped into the pond by the train men. A charge of 3 cents per 100 pounds is passed to the

credit of the tap line by the lumber company on its books, but apparently is not actually paid. The Illinois Central places the empty cars at the mill and takes the shipments of lumber therefrom. The rates on lumber which it publishes in connection with the tap line are uniformly 2 cents per 100 pounds higher than the rate from the junction point; and the gross allowance is 4 cents per 100 pounds. Shipments of lumber by the independent sawmills are loaded on narrow-gauge cars and hauled by the tap line to the junction point, where it transfers the lumber into standard-gauge cars furnished by the Illinois Central; the latter company issues a bill of lading reading from the junction point. On such shipments the tap line apparently assesses a local charge of 3 cents per 100 pounds in addition to the rate of the Illinois Central from the junction point; and the shipper is also required to pay 50 cents per 1,000 feet for the transfer of the lumber from car to car.

The aggregate traffic for the year ending June 30, 1910, was 64,082 tons, of which all but 3,762 tons was supplied by the proprietary company. There were 765 tons of agricultural products moving outbound, and 1,597 tons of merchandise and miscellaneous freight. The remainder of the tonnage was forest products. The revenue from all this traffic was \$51,785.34. The tap line received \$801.58 for carrying the mail, and received on passenger traffic \$2,823.83. It had a net surplus on June 30, 1910, of \$12,508.11. No salaries are paid to its officers, who are officers also of the lumber company.

Here again the mill of the proprietary company is not only immediately on the rails of the trunk line but the service on the products of the mill is performed by the trunk line. Under such circumstances we regard any allowance to the tap line on the products of the mill of the controlling company as an unlawful rebate to the lumber company.

NEW ORLEANS, NATALBANY & NATCHEZ RAILWAY.

The stockholders of the Natalbany Lumber Company hold practically the entire capital stock, amounting to \$155,000, of the New Orleans, Natalbany & Natchez Railway Company, which was incorporated in 1902 and owes the lumber company \$181,482.89. As heretofore stated, the Natalbany Lumber Company is controlled by the Denkmann interests, who also own the Kentwood, Greensburg & Southwestern Railroad, *supra*. The tap line, the mill, and the timber were purchased by the Denkmann interests in one transaction, the value of the properties, however, being separately estimated.

The track of the tap line extends from a connection with the Illinois Central at Natalbany, La., in a northwesterly direction for 25

miles to a point known as Pine Grove. There are about 7 miles of spur tracks and sidings, with nearly 8 miles of unincorporated logging tracks which connect with the tap line at various points. There are said to be station buildings at Natalbany, Montpelier, and Pine Grove, with public team tracks; and the tap line has track scales. It has 10 locomotives, 2 passenger cars, a caboose, 6 box cars, and 130 flat cars, 2 motor cars, and a pile driver. Six of the locomotives are leased to the lumber company at a charge of \$12 per day for each. The tap line employs 3 agents, 4 train crews, and 5 gangs of trackmen, none of whom are employed by the lumber company.

The Natalbany Lumber Company has three sawmills, two of which, together with the planer, are about a mile from Natalbany at a point designated as Mason. The other sawmill is within 100 feet of the right of way of the Illinois Central in Natalbany, but the loading track is owned by the tap line.

The logs are loaded by employees of the lumber company and are assembled into trains and hauled over the unincorporated spurs to the main track by the lumber company, which uses for that purpose the locomotives leased from the tap line. The latter hauls the logs to the mill and the train men unload them into the pond. At the end of each month a bill is rendered to the lumber company for the movement of the logs, at a rate of 3 cents per 100 pounds. The lumber manufactured at the three mills is switched by the tap line a distance of from 1,500 feet to about 1 mile to the interchange track, from which they are taken by the Illinois Central. The agent of the trunk line issues the bills of lading. The rates on lumber in effect over the Illinois Central from Natalbany are applied on shipments from the mills of the proprietary company; and the Illinois Central allows a division of 2 cents per 100 pounds. But the independent mills served by the tap line, of which there are said to be seven, pay on their lumber shipments rates that are 2 cents per 100 pounds higher than the rates from Natalbany.

It is stated that the tap line runs two "mixed trains" in each direction daily on a regular schedule, on which passengers and the mail are carried, and that in addition there are usually four logging trains, on irregular schedule. The passenger and mail earnings for the fiscal year 1910, as reported to the Commission, aggregate \$4,246.22. The freight revenue for the same year amounted to \$159,051.71. At the end of that year the surplus, as accumulated from the operations of three years, amounted to \$73,914. It is estimated that about 80 per cent of the entire freight traffic is supplied by the proprietary company. The volume of forest products for the year 1910 was 236,657 tons and the miscellaneous freight weighed 3,182 tons.

We hold on the facts disclosed in the record of this case that any allowance out of the rate to the tap line in excess of a reasonable

switch charge for the service performed on the products of two of the mills of the proprietary company is unlawful. We fix the switching charge at \$1.50 as a maximum. The third mill is situated within 100 feet of the tracks of the Illinois Central, but the switch track has been so laid as to give the tap line a haul of 1,500 feet. On the products of that mill no allowance should be made.

LIBERTY-WHITE RAILROAD.

The entire capital stock of the Liberty-White Railroad Company, of which \$300,600 has been issued, is owned by the stockholders of the J. J. White Lumber Company, the shares in the two corporations being held in substantially the same proportions. Their officers are identical; and the tap line owes the lumber company or its president about \$134,000.

Prior to 1880 a narrow-gauge logging road was laid from McComb, Miss., westward into the timber. When the land was all cut over the track was about to be abandoned and taken up when the citizens of the town of Liberty induced the owners to change the location of the tracks and build into that point. Such is the statement on the record. The tap line was incorporated in December, 1902, and then took over the tracks already laid and in operation, the narrow-gauge line being changed to standard gauge. As incorporated the operation did not begin until June, 1904. In 1907 about 9 miles of track were built eastward from McComb to a point known as New Holmesville. The line now in operation, as described on the record, connects with the Illinois Central at McComb, extending from that point westward about 24 miles to Liberty, and also extending eastward from McComb for 9 miles to New Holmesville. The tap line also operates under a trackage agreement, at a rental of \$300 per month, an unincorporated track 10 miles in length connecting with its main line at a point between McComb and Liberty known as Irene, and running southward a distance of 10 miles to Keith. The equipment consists of 5 locomotives, a mail and baggage car, 6 passenger cars, 1 passenger motor car, 2 cabooses, 4 tank cars, and 14 box cars. There are station buildings at a number of points on the line, costing from \$1,500 to \$2,500 each. The tap line has a train master, roadmaster, 6 station agents, 12 enginemen, 10 trainmen, and several crews of trackmen. It is said that none of its employees are in the service of the lumber company. Two passenger trains and two logging trains run daily between McComb and Liberty; and there is one daily "mixed train" running eastward from McComb to New Holmesville and return. The passenger revenues for the year 1910 aggregated \$15,190.39; the receipts from express matter were \$686.51, and for the carriage of the mails \$1,437.08. The freight earnings for the same year amounted to \$94,766.57. The principal traffic was forests products, of which

there were 127,214 tons out of a total freight movement of 137,789 tons. The proprietary company contributed 89,514 tons of the forest products, and 37,700 tons of such commodities are said to have been shipped by others. It will be observed therefore that there is a substantial tonnage in which the proprietary company was not directly interested.

The mill is near the tracks of the Illinois Central in McComb, and that company customarily places the empty cars at the loading platform and moves the shipments therefrom. The tap line occasionally switches a car from the mill, a distance of about 600 feet. The logs are loaded by the lumber company, and the cars are moved by it to the junction of the logging spurs with the main line; from that point they are taken by the tap line to the mill, for which a charge of \$5 per car is made against the lumber company. The through rates on lumber from points on the tap line are 2 cents per 100 pounds higher than the Illinois Central rate from McComb. The tap line is allowed 4 cents per 100 pounds, or 2 cents in addition to the arbitrary. From the mill of the proprietary company the rate applied does not include the arbitrary of 2 cents, and the tap line receives on such traffic a division of 2 cents per 100 pounds. There are no joint rates on other commodities or on class freight.

We hold on the facts appearing here that any allowance out of the rate on the products of the mill of the proprietary company is unlawful.

NATCHEZ, COLUMBIA & MOBILE RAILROAD.

The capital stock of the Natchez, Columbia & Mobile Railroad Company, of which \$900,000 has been issued, is held by the same persons and in the same proportions as the stock of the Butterfield Lumber Company, which has a mill at Norfield, Miss. The track of the tap line joins the Illinois Central at Norfield and extends eastward for 14 miles to a point known as Main Line Junction, where it divides into two branches, one extending northeastward for about 9 miles to Old Camp, and the other track running southward about $7\frac{1}{2}$ miles to Furlough switch. In addition to these tracks, aggregating about 30 miles in length, the tap line builds and operates for the lumber company logging tracks of a temporary character joining the main line at various points and extending into the timber that is being cut. There are three towns or settlements where the tap line has station buildings, and at the junction point, Norfield, it employs jointly the agent of the Illinois Central. There are track scales at Norfield on which the employees of the tap line weigh the shipments of the lumber company. The equipment consists of 7 locomotives, 1 baggage car, 2 passenger cars, 2 box cars, 10 flat cars, and 75 logging cars, with a few work cars and a pile driver.

The tap line was incorporated in 1892, and the first construction of the track was coincident with the building of the mill of the lumber company. It is stated that the latter had previously endeavored to get the Illinois Central to build a track for the purpose of bringing logs from the timber to the mill, and being unsuccessful in this effort it undertook the construction of the tap line.

The logs are loaded on the cars by employees of the lumber company, but the locomotives of the tap line not only move the cars to the mill but perform all necessary service on the logging spurs in the woods, including the movement of the log loader from place to place. The train employees unload the logs into the pond at the mill. For these services a charge of 2 cents per 100 pounds is set up against the lumber company, together with a special switching charge of \$1 per car for the services on the logging spurs. The tap line switches the empty and loaded cars for the lumber shipments between the mill and the interchange track with the Illinois Central, a distance of one-quarter of a mile, the mill being adjacent however to the Illinois Central right of way. The rates published by the Illinois Central in which the tap line participates are 2 cents per 100 pounds higher than the junction-point rates. In the case of shipments by the proprietary lumber company this arbitrary represents the charge of 2 cents already referred to for moving the logs to the mill. The Illinois Central gives a division of 4 cents per 100 pounds or a net payment out of its earnings of 2 cents. It is interesting to observe the way in which the payments are made: The charges on the lumber are assessed by the Illinois Central at the regular rate from the junction point; and at the end of each month, upon presentation by the tap line of a statement of the inbound movements of logs to the mill, the claim department of the Illinois Central refunds 2 cents per 100 pounds. There are several small independent mills along the tap line, including one, known as the Busbee mill, which has a sidetrack connecting with the tap line. These mills pay on their lumber 2 cents per 100 pounds more than the rates in effect from the junction point; and those mills have to bear the entire cost of moving their logs in.

The tap line runs two logging trains daily, to one of which a passenger coach is attached. It also runs one other train, referred to on the record as a "mixed train," on which passengers and mail are carried. Its revenues during the year 1910 from the carriage of passengers and mails aggregated \$3,735. During the same year it earned on freight traffic \$101,213.05. There was an accumulated deficit on June 30, 1910, of \$556,890.70. This has been taken care of in some way by the lumber company. The record clearly indicates that the entire revenues are paid over to the lumber company and placed to the credit of the tap line on its books. The lumber company makes

all disbursements, purchases the material and supplies, and pays the employees of the tap line. It owns the shops where the locomotives and cars of the tap line are kept in repair.

The record does not indicate the exact proportion of the freight traffic in which the proprietary company was interested, but during the year 1910 there were 16,611 tons of lumber and about 168,000 tons of logs. During the same year 1,692 tons of agricultural products and merchandise moved outbound, and 3,063 tons of merchandise and supplies, together with 3,773 tons of coal, moved in. A large proportion of this traffic was apparently handled for the account of the lumber company or its employees. There are several stores and commissaries along the line, some of which are owned by outside interests, and operated by the lumber company under some special arrangement.

We find no justification here for any allowance on the products of the mill of the proprietary lumber company.

ALABAMA CENTRAL RAILROAD.

The Alabama Central Railroad Company was incorporated in 1906 with an authorized capital stock of \$100,000, of which \$90,000 has been issued and is owned by E. M. Barton, its president, who, with his family, owns a majority of the stock of the Manchester Lumber Company. The tap line has no bonds; its track connects with the Illinois Central, the Frisco, and the Northern Alabama Railway at Jasper, Ala., and extends northward for a distance of less than seven miles to Manchester. Beyond that point the lumber company has an unincorporated logging road. The equipment of the tap line consists of one locomotive and one combination passenger car. The lumber company owns and operates locomotives and logging cars. Its mill is at Manchester, a sawmill town with a population of about 500, where there is a company store. There is said to be coal underlying a considerable portion of the timber land of the lumber company, which exceeds 26,000 acres; but no mines have been opened.

When the mill was opened the public carriers proposed to build or assist in the building of the necessary track to reach their lines; but their offers were not taken advantage of, the tap line corporation being formed to build and operate the track. One train runs daily in each direction over the tap line, on which a few passengers are carried, the revenue therefrom being \$280.50 for the year 1910; for the carriage of the mail the tap line received \$294.97, while its revenues from express traffic amounted to \$4.96. Over 85 per cent of its freight revenues, amounting to \$13,014.25, for the same year, accrued on traffic of the proprietary company, and about 40 per cent of that amount was paid by the trunk lines, which make a uni-

form allowance of 2 cents per 100 pounds out of their published rates on lumber. There are no through rates or allowances on other commodities. The lumber company itself moves the logs over the spurs to a point on its unincorporated line about 4 miles north of the mill; from that point the engine of the tap line moves the cars to the mill at a charge of 50 cents per 1,000 feet. The tap line moves the lumber over the full length of its line from the mill at Manchester to the junction at Jasper, a distance of 7 miles.

Although the tap line has been receiving divisions for several years it did not file an annual report with the Commission until August 14, 1911, when it presented the report for the fiscal year 1910. This report showed a small deficit from the operation of the road to that date.

In this case a division out of the rate may lawfully be made to the tap line by its trunk line connections not exceeding $1\frac{1}{2}$ cents per 100 pounds.

WASHINGTON & CHOCTAW RAILWAY.

The E. W. Gates Lumber Company was incorporated in 1904, and acquired a tract of timber and a narrow-gauge logging road about 3 miles in length. The latter was abandoned, and a standard-gauge line was constructed, which now extends from a connection with the Mobile & Ohio Railroad at Yellow Pine, Ala., in a northerly direction for about 22 miles to a point known as Matthews. This track is owned and operated by the Washington & Choctaw Railway Company, which was incorporated in December, 1910, immediately prior to the hearing, with an authorized capital stock of \$700,000, of which \$200,000 is outstanding, having been issued to the lumber company in exchange for the track and equipment. It is stated that the tap line owes the lumber company about \$49,000; it is also said that the cost of the road up to the date of the hearing exceeded \$250,000. Beyond Matthews is 4 or 5 miles of track operated by the lumber company in its logging operations; but the steel is furnished by the tap line without charge. The equipment consists of 2 locomotives, 6 box cars, 4 flat cars, and 40 logging cars. There are station structures at one or two points on the line, and also loading tracks.

It is not definitely stated on the record that the lumber company owned the entire capital stock of the tap line, but we infer that the two companies are substantially one in interest. Previous to the incorporation in 1910 the tap line was run as a department of the lumber company, whose charter authorized the conducting of railroad operations.

The sawmill of the lumber company is about a quarter of a mile from the junction with the Mobile & Ohio, but the planing mill is reached directly by the tracks of the trunk line. There are said to

be several small towns or settlements along the tap line with populations ranging from 100 to 600, each having one or more stores. It is also claimed that five independent sawmills and eight or nine cotton gins use the facilities of the tap line; and there are many farms along the line. The tonnage statements filed of record relate to a period of 11 months ending December 1, 1910, during which 76,592 tons of freight were handled. The proprietary lumber company shipped 60,000 tons of lumber and forest products, while 13,000 tons of such freight were shipped by others, together with 2,000 tons of crossties, which were apparently cut on the lands of the lumber company. About 800 tons of cotton and cottonseed and about the same quantity of merchandise were handled. The statement is that 80 per cent of the forests products and 20 per cent of the miscellaneous freight were supplied by the proprietary company. The tap line does not carry passengers, mail, or express, but operates one regular logging or freight train daily in each direction, and three other such trains at irregular times.

The logs are hauled by the tap line from the points where they are loaded on the logging spurs to the mill, a charge of 3 cents being set up against the lumber company for this service. Most of the lumber is apparently shipped out in the rough and is switched by the tap line a distance of about a quarter of a mile from the mill to the interchange track. The shipments of dressed lumber are moved by the trunk line from the loading track at the planing mill. On all lumber shipments of the proprietary company the tap line receives from the Mobile & Ohio a division of 3 cents per 100 pounds, out of the junction-point rates. The same rates and the same allowances apply in connection with the lumber shipped by independent producers.

The tap line filed its first annual report with the Commission for the fiscal year ending June 30, 1911.

In this case we think that any allowance to the tap line on the dressed lumber is unlawful, but a reasonable switching charge of \$1.50 a car may lawfully be paid to the tap line for switching the rough lumber from the sawmill to the trunk line.

IRREGULAR PRACTICES OF TAP LINES.

It appears from the foregoing statements respecting the several tap lines described in this supplemental report, as well as from the statement of those described in the original report, that there are many respects in which the law and the rules and regulations of the Commission are not observed by them. Although claiming to be common carriers, some of them did not file annual reports with the Commission until recently. The reports of others are so far from being complete that they can not be said to comply with the require-

ments of the act. Many of them also do not publish any local rates to apply on traffic received from or delivered to their trunk-line connections. Many of them carry passengers and less-than-carload shipments without charge at all; others make a charge without the authority of published tariffs. We have already referred to the use made by controlling lumber companies of their tap lines under formal and informal agreements for trackage rights with and without charge, and all without any tariff authority. The Hours of Service law, the Safety Appliance act, and other acts imposing certain requirements on common carriers engaged in interstate commerce are not fully complied with in many cases and in others are wholly disregarded. There is a lack of attention also to our rules and regulations respecting the filing of tariffs and the keeping of accounts. In some cases our examiners have been refused full access to the books of tap lines. With respect to all these matters the law makes no exception in favor of any railroads that purport to be common carriers. While our conclusions in no instance have been based on the failure of a tap line to comply with our rules and regulations, we must give warning to all such companies that purport to hold themselves out as common carriers that such irregularities must promptly be corrected.

GENERAL COMMENTS.

The rates of the trunk lines for the movement of logs in this territory are penalty rates; that is to say, the inbound rate to the mill is higher than it should be and is reduced to a net rate, provided the lumber goes out over the rails of the same carrier. Such rate adjustments are adverted to and criticized in *Red River Cotton Oil Co. v. T. & P. Ry. Co.*, 23 I. C. C., 437. So far as we can see from a careful examination of the record there is no real necessity for any such rate adjustment in this territory. The penalty rates should be withdrawn, and in their place the carriers ought to fix reasonable flat rates for the inbound log movement.

Orders will be entered as soon as possible to give effect to the views expressed in the original and supplemental reports herein. Tariffs fixing rates and switching charges in accordance with our conclusions may be filed on three days' notice. The carriers will also be expected to submit for the approval of the Commission the basis of allowances to lumber companies, under section 15, in the cases where in the original and supplemental reports we have said that such allowances might properly be paid. When approved by the Commission such allowances must be published.

In the majority of cases the tap lines have made no joint class and commodity rates with their trunk-line connections. In other

cases joint rates have been established, at least to some destinations. Where joint through class and commodity rates are in effect or are hereafter made effective to or from points on tap lines the trunk lines and the tap lines will be expected to submit to the Commission for approval the basis of their divisions. It is expected also that they will submit for our approval reasonable and nondiscriminatory rates on forest product when shipped from tap-line points other than the mills of the controlling companies, and will also submit the bases of the divisions thereof.

When all these matters shall have been adjusted in compliance with the views of the Commission an order will be entered authorizing trunk lines to make settlements on these bases with respect to all traffic moving after May 1, either under section 15 or as allowances out of the rate, as provided herein in the respective cases.

Orders in other cases in which these or other tap lines in this territory are parties defendant may be called to our attention in case they are in conflict herewith.

23 I. C. C.

651

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of May, A. D. 1912.

INVESTIGATION AND SUSPENSION DOCKET No. 11.

IN THE MATTER OF THE INVESTIGATION AND SUSPENSION OF SCHEDULES CANCELING THROUGH RATES WITH CERTAIN TAP-LINE CONNECTIONS; AND CERTAIN OTHER CASES CONSOLIDATED HEREWITH.

It appearing, That a full investigation of the matters and things herein involved has been had, and the Commission, on April 23, 1912, having made and filed a report containing its findings of fact and conclusions thereon, and having also on the date hereof made and filed a supplemental report containing its further findings of fact and conclusions thereon, which said reports are hereby referred to and made a part hereof;

It further appearing, That the Commission has found that in the case of the following-named parties to the record, and each of them, namely:

Malvern & Freeo Valley Railway Company;
Wilmar & Saline Valley Railroad Company;
Arkansas & Gulf Railroad Company;
Little Rock, Maumelle & Western Railroad Company;
Beirne & Clear Lake Railroad;
Mississippi, Arkansas & Western Railway Company;
Bearden & Ouachita River Railroad Company;
Arkansas Eastern Railroad Company;
Blytheville, Burdette & Mississippi River Railway Company;
Brookings & Peach Orchard Railroad Company;
Crossett Railway Company;
Fordyce & Princeton Railroad Company;
Homan & Southeastern Railway Company;
Little Rock, Sheridan & Saline River Railway Company;
L'Anquille River Railway Company;
Ouachita Valley Railway Company;
Griffin, Magnolia & Western Railway Company;
Saline Bayou Railway Company;
Enterprise Railway Company;
Natchez, Ball & Shreveport Railway Company;
Black Bayou Railroad Company;
The Bodcaw Valley Railway Company;
Mill Creek & Little River Railway & Navigation Company;
Red River & Rocky Mount Railway Company;
Woodworth & Louisiana Central Railway Company;
Freeo Valley Railroad Company;

Natchez, Uria & Ruston Railway Company;
 Bernice & Northwestern Railway Company;
 Dorcheat Valley Railroad Company;
 Manghan & Northeastern Railway Company;
 Galveston, Beaumont & Northeastern Railway Company;
 Peach River & Gulf Railway Company;
 Riverside & Gulf Railway Company;
 Jefferson & Northwestern Railway Company;
 Beaumont & Saratoga Transportation Company;
 Angelina & Neches River Railroad Company;
 Missouri & Louisiana Railroad Company;
 Saginaw & Ouachita River Railroad Company;
 Warren, Johnsville & Saline River Railroad Company;
 Blytheville, Leachville & Arkansas Southern Railroad Company;
 The Caddo & Choctaw Railroad Company;
 Manila & Southwestern Railway Company;
 Louisiana & Pine Bluff Railway Company;
 Mansfield Railway & Transportation Company;
 Louisiana & Pacific Railway Company;
 Roosevelt & Western Railroad Company;
 Tioga & Southeastern Railway Company;
 Louisiana Central Railroad Company;
 Monroe & Southwestern Railway Company;
 Victoria, Fisher & Western Railroad Company;
 Ouachita & Northwestern Railroad Company;
 Lake Charles Railway & Navigation Company;
 Louisiana Railway Company;
 Zwolle & Eastern Railway Company;
 Sabine & Northern Railroad Company;
 Gideon & North Island Railroad Company;
 Poplar Bluff & Dan River Railway Company;

the service performed for the respective proprietary lumber companies in moving the logs from their respective forests to their respective mills and in moving the product from the mills to the trunk lines is not a service of transportation by a common carrier railroad and that any allowances or divisions out of the rate on account thereof are unlawful:

It further appearing, That the following parties to the record, namely:

Little Rock, Maumelle & Western Railroad Company;
 Bearden & Ouachita River Railroad Company;
 Arkansas Eastern Railroad Company;
 Crossett Railway Company;
 Fordyce & Princeton Railroad Company;
 Ouachita Valley Railway Company;
 Freese Valley Railroad Company;
 Dorcheat Valley Railroad Company;
 Galveston, Beaumont & Northeastern Railway Company;
 Peach River & Gulf Railway Company;
 Riverside & Gulf Railway Company;
 Angelina & Neches River Railroad Company;
 Saginaw & Ouachita River Railroad Company;
 Blytheville, Leachville & Arkansas Southern Railroad Company;
 The Caddo & Choctaw Railroad Company;
 Manila & Southwestern Railway Company;
 Louisiana & Pine Bluff Railway Company;
 Mansfield Railway & Transportation Company;
 Lake Charles Railway & Navigation Company;
 Louisiana Railway Company;
 Zwolle & Eastern Railway Company;
 Gideon & North Island Railroad Company;

have heretofore filed with the Commission petitions asking for the establishment or reestablishment of through routes and joint rates on forest products to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein and on which a full hearing has been had:

It is ordered, That said petitions, so far as they relate to rates on the products of the mills of the proprietary companies, be, and for the reasons set forth in said reports they are hereby, dismissed.

It is further ordered, That the defendants The Chicago, Rock Island & Pacific Railway Company; St. Louis & San Francisco Railroad Company; New Orleans, Texas & Mexico Railroad Company; Beaumont, Sour Lake & Western Railway Company; St. Louis, Iron Mountain & Southern Railway Company; The Texas & Pacific Railway Company; International & Great Northern Railway Company; The Missouri, Kansas & Texas Railway Company of Texas; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; The Paragould Southeastern Railway Company; Eastern Texas Railroad Company; The Kansas City Southern Railway Company; Texarkana & Fort Smith Railway Company; The Houston, East & West Texas Railway Company; Texas & New Orleans Railroad Company; Louisiana Western Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; Lake Charles & Northern Railroad Company; Vicksburg, Shreveport & Pacific Railway Company; Louisiana & Arkansas Railway Company; Louisiana Railway & Navigation Company; Gulf, Colorado & Santa Fe Railway Company; The Texas & Gulf Railway Company; Missouri & North Arkansas Railroad Company; Illinois Central Railroad Company; Southern Railway Company; Northern Alabama Railway Company; New Orleans Great Northern Railroad Company; and Mobile & Ohio Railroad Company be, and they are hereby, authorized, on not less than three days' notice, to reopen through routes and publish joint rates with the following parties to the record, and each of them, on the products of the mills of their respective proprietary companies:

Saline River Railway Company;
 Warren & Ouachita Valley Railway Company;
 El Dorado & Wesson Railway Company;
 Thornton & Alexandria Railway Company;
 Doniphan, Kensett & Searcy Railway;
 Fourche River Valley & Indian Territory Railway Company;
 Prescott & Northwestern Railroad Company;
 Memphis, Dallas & Gulf Railroad Company;
 Crittenden Railroad Company;
 De Queen & Eastern Railroad Company;
 Central Railway Company of Arkansas;
 Gulf & Sabine River Railroad Company;
 The Sibley, Lake Bisteneau & Southern Railway Company;
 North Louisiana & Gulf Railroad Company;
 Arkansas Southeastern Railroad Company;
 Red River & Gulf Railroad Company;

Tremont & Gulf Railway Company;
 The Nacogdoches & Southeastern Railroad Company;
 Texas Southeastern Railroad Company;
 Timpson & Henderson Railway Company;
 Shreveport, Houston & Gulf Railroad Company;
 Groveton, Lufkin & Northern Railway Company;
 Moscow, Camden & San Augustine Railway Company;
 Trinity Valley & Northern Railway Company;
 Trinity Valley Southern Railroad Company;
 Caro Northern Railway Company;
 Butler County Railroad Company;
 Deering Southwestern Railway;
 Mississippi Valley Railway Company;
 Paragould & Memphis Railway Company;
 Salem, Winona & Southern Railroad Company;
 Fernwood & Gulf Railroad Company;
 New Orleans, Natalbany & Natchez Railway Company;
 Alabama Central Railroad Company;
 Washington & Choctaw Railway Company;

Provided, The allowances or divisions out of such joint rates to be paid on the products of the mills of the said proprietary companies shall not exceed the divisions or allowances specified in the afore-said supplemental report of the Commission.

It is further ordered, That, for the reasons specified in the said supplemental report, no allowances or divisions shall be made on the products of the mills of the lumber companies owning or controlling the following companies party to the record:

Gould Southwestern Railway Company;
 Kentwood & Eastern Railway Company;
 Kentwood, Greensburg & Southwestern Railroad Company;
 Liberty-White Railroad Company;
 Natchez, Columbia & Mobile Railroad Company.

And it is further ordered, That the joint rates hereinabove authorized may be published on three days' notice to the public and to the Commission, the tariffs to refer to this order by date and number, and on like notice any of the said defendants or parties to the record may republish rates on class and commodity traffic and on products of mills other than those of the respective proprietary lumber companies.

By the Commission.

[SEAL.]

JOHN H. MARBLE,

Secretary.

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Arkansas Eastern Railroad Company;
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Crossett Railway Company;
Fordyce & Princeton Railroad Company;
Homan & Southeastern Railway Company;
Little Rock, Sheridan & Saline River Railway Company;
L'Anguille River Railway Company;
Ouachita Valley Railway Company;
Griffin, Magnolia & Western Railway Company;
Saline Bayou Railway Company;
Enterprise Railway Company;
Natchez, Ball & Shreveport Railway Company;
Black Bayou Railroad Company;
The Bodcaw Valley Railway Company;
Mill Creek & Little River Railway & Navigation Company;
Red River & Rocky Mount Railway Company;
Woodworth & Louisiana Central Railway Company;
Freeo Valley Railroad Company;
Natchez, Urania & Ruston Railway Company;
Bernice & Northwestern Railway Company;
Dorcheat Valley Railroad Company;
Manghan & Northeastern Railway Company;
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Peach River & Gulf Railway Company;
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Jefferson & Northwestern Railway Company;
Beaumont & Saratoga Transportation Company;
Angelina & Neches River Railroad Company;
Missouri & Louisiana Railroad Company;
Saginaw & Ouachita River Railroad Company;
Warren, Johnsville & Saline River Railroad Company;
Blytheville, Leachville & Arkansas Southern Railroad Company;
The Caddo & Choctaw Railroad Company;
Manila & Southwestern Railway Company;
Louisiana & Pine Bluff Railway Company;
Mansfield Railway & Transportation Company;
Louisiana & Pacific Railway Company;
Roosevelt & Western Railroad Company;
Tioga & Southeastern Railway Company;
Louisiana Central Railroad Company;
Monroe & Southwestern Railway Company;
Victoria, Fisher & Western Railroad Company;
Ouachita & Northwestern Railroad Company;
Lake Charles Railway & Navigation Company;
Louisiana Railway Company;
Zwolle & Eastern Railway Company;
Sabine & Northern Railroad Company;
Gideon & North Island Railroad Company;
Poplar Bluff & Dan River Railway Company;

that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber com-

panies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common-carrier railroad but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports;

3. *It is ordered*, That the principal defendants, The Chicago, Rock Island & Pacific Railway Company; St. Louis & San Francisco Railroad Company; New Orleans, Texas & Mexico Railroad Company; Beaumont, Sour Lake & Western Railway Company; St. Louis, Iron Mountain & Southern Railway Company; The Texas & Pacific Railway Company; International & Great Northern Railway Company; The Missouri, Kansas & Texas Railway Company of Texas; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; The Paragould Southeastern Railway Company; Eastern Texas Railroad Company; The Kansas City Southern Railway Company; Texarkana & Fort Smith Railway Company; The Houston, East & West Texas Railway Company; Texas & New Orleans Railroad Company; Louisiana Western Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company; Lake Charles & Northern Railroad Company; Vicksburg, Shreveport & Pacific Railway Company; Louisiana & Arkansas Railway Company; Louisiana Railway & Navigation Company; Gulf, Colorado & Santa Fe Railway Company; The Texas & Gulf Railway Company; Missouri & North Arkansas Railroad Company; Illinois Central Railroad Company; Southern Railway Company; Northern Alabama Railway Company; New Orleans Great Northern Railroad Company; and Mobile & Ohio Railroad Company be, and they are hereby, notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above-named parties to the record in respect of any such above-described service.

4. *It further appearing*, That the following parties to the record, namely:

Little Rock, Maumelle & Western Railroad Company;
Bearden & Ouachita River Railroad Company;
Arkansas Eastern Railroad Company;
Crossett Railway Company;
Fordyce & Princeton Railroad Company;
Ouachita Valley Railway Company;
Freeo Valley Railroad Company;
Dorcheat Valley Railroad Company;
Galveston, Beaumont & Northeastern Railway Company;
Peach River & Gulf Railway Company;
Riverside & Gulf Railway Company;

Angelina & Neches River Railroad Company;
 Saginaw & Ouachita River Railroad Company;
 Blytheville, Leachville & Arkansas Southern Railroad Company;
 The Caddo & Choctaw Railroad Company;
 Manila & Southwestern Railway Company;
 Louisiana & Pine Bluff Railway Company;
 Mansfield Railway & Transportation Company;
 Lake Charles Railway & Navigation Company;
 Louisiana Railway Company;
 Zwolle & Eastern Railway Company;
 Gideon & North Island Railroad Company;

have heretofore filed with the Commission their several petitions asking for the establishment or reestablishment of through routes and joint rates to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein and on which a full hearing has been had:

5. *It is ordered*, That said petitions, so far as they relate to rates on the products of the mills of the respective proprietary companies, be, and for the reasons set forth in said reports they are hereby, dismissed.

6. *It further appearing*, That the following parties to the record, namely:

Warren & Ouachita Valley Railway Company;
 El Dorado & Wesson Railway Company;
 Thornton & Alexandria Railway Company;
 Fourche River Valley & Indian Territory Railway Company;
 Prescott & Northwestern Railroad Company;
 Crittenden Railroad Company;
 North Louisiana & Gulf Railroad Company;
 Arkansas Southeastern Railroad Company;
 Red River & Gulf Railroad Company;
 Tremont & Gulf Railway Company;
 The Nacogdoches & Southeastern Railroad Company;
 Texas Southeastern Railroad Company;
 Shreveport, Houston & Gulf Railroad Company;
 Groveton, Lufkin & Northern Railway Company;
 Trinity Valley & Northern Railway Company;
 Trinity Valley Southern Railroad Company;
 Caro Northern Railway Company;
 Butler County Railroad Company;
 Deering Southwestern Railway;
 Mississippi Valley Railway Company;
 Paragould & Memphis Railway Company;

have heretofore filed with the Commission their several petitions asking for the establishment or reestablishment of through routes and joint rates to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein, and on which a full hearing has been had:

7. *It is ordered*, That the said principal defendants above named be, and they are hereby, required, on or before January 1, 1913, to

reestablish, and for a period of two years to maintain with each of the said parties to the record last above named, the through interstate routes and joint rates in effect, in accordance with their respective tariffs filed with this Commission, on April 30, 1912;

8. *Provided*, That the rates on yellow-pine lumber and articles taking the same rates from points on the lines of the last above-named parties to the record shall not exceed the current rates in effect from the junction points; and

9. *Provided further*, That the allowances or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said last-named parties to the record on the products of the mills of the said respective proprietary companies named in said report shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the Commission, which are hereby fixed as maximum divisions or allowances thereon, until further order, the Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful.

10. *It is further ordered*, That in the case of the following parties to the record, by which petitions for the establishment or reestablishment of through routes and joint rates have not been filed, namely:

Saline River Railway Company;
Doniphan, Kensett & Searcy Railway;
Memphis, Dallas & Gulf Railroad Company;
De Queen & Eastern Railroad Company;
Central Railway Company of Arkansas;
Gulf & Sabine River Railroad Company;
The Sibley, Lake Bisteneau and Southern Railway Company;
Timpson & Henderson Railway Company;
Moscow, Camden & San Augustine Railway Company;
Salem, Winona & Southern Railroad Company;
Fernwood & Gulf Railroad Company;
New Orleans, Natalbany & Natchez Railway Company;
Alabama Central Railroad Company;
Washington & Choctaw Railway Company;

the said principal defendants be, and they are hereby, authorized to reestablish the through routes and joint rates in effect, in accordance with their respective tariffs filed with this Commission, on April 30, 1912, subject to the terms and conditions prescribed in paragraphs 8 and 9 hereof; and *provided further*, that upon the failure of the principal defendants to reestablish the through routes and joint rates in effect on April 30, 1912, with the last above-named parties to the record on or before January 1, 1913, the Commission will upon the filing herein of appropriate petitions therefor enter an order upon the record herein requiring the reestablishment of such through routes and joint rates.

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11. *It is further ordered*, That in case of the failure of the principal defendants to reestablish, on or before January 1, 1913, the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of the respective proprietary companies in the case of any of the parties to the record first herein above named, the Commission will upon appropriate petition herein enter an order requiring the establishment of such through routes and joint rates or enter upon an inquiry with respect thereto.

12. *It is further ordered*, That the divisions of all joint rates herein required and authorized to be reestablished on traffic other than the products of the mills of the several proprietary lumber companies shall be submitted to the Commission by the parties hereto for approval.

13. *It is further ordered*, That, in the case of the following parties to the record, namely:

Gould Southwestern Railway Company;
Kentwood & Eastern Railway Company;
Kentwood, Greensburg & Southwestern Railroad Company;
Liberty-White Railroad Company;
Natchez, Columbia & Mobile Railroad Company;

for the reasons specified in the said supplemental report no allowances or divisions shall be made on the products of the mills of the respective proprietary lumber companies.

14. *And it is further ordered*, That the joint rates herein above authorized or required may be published on three days' notice to the public and to the Commission, the tariffs to refer to this order by date and number.

By the Commission.

[SEAL.]

JOHN H. MARBLE,
Secretary.

○

United States Commerce Court.

JUNE SESSION, 1913.

LOUISIANA & PACIFIC RAILWAY COMPANY }
et al., petitioners, }
v. } No. 90.
THE UNITED STATES OF AMERICA ET AL., }
respondents. }

WOODWORTH & LOUISIANA CENTRAL RAIL- }
way Company (Limited), et al., peti- }
tioners, }
v. } No. 91.
THE UNITED STATES OF AMERICA ET AL., }
respondents. }

MANSFIELD RAILWAY & TRANSPORTATION }
Company et al., petitioners, }
v. } No. 92.
THE UNITED STATES OF AMERICA, RESPOND- }
ent. }

VICTORIA, FISHER & WESTERN RAILROAD }
Company et al., petitioners, }
v. } No. 93.
THE UNITED STATES OF AMERICA, RESPOND- }
ent. }

INTERSTATE COMMERCE COMMISSION, RAILROAD }
Commission of Louisiana, Atchison, Topeka & }
Santa Fe Railway Company, and Gulf, Colorado }
& Santa Fe Railway Company, interveners. }

ON FINAL HEARING.

(For opinion of Interstate Commerce Commission see 23 I. C. C. Rep. 277 and 549.)

Mr. Luther M. Walter and *Mr. H. M. Garwood*, with whom *Mr. W. R. Thurmond* was on the brief, for the petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. Wylie M. Barrow, with whom *Mr. Ruffin G. Pleasant* was on the brief, for the Railroad Commission of Louisiana.

Mr. James L. Coleman, with whom *Mr. Robert Dunlap* and *Mr. T. J. Norton* were on the brief, for intervening carriers.

Before KNAPP, Presiding Judge, and HUNT, CARLAND, and MACK, Judges.

(November 26, 1913.)

MACK, Judge:

Following the supplemental report of the Interstate Commerce Commission in *Star Grain & Lumber Co. v. A. T. & S. F. Railroad* (14 I. C. C., 364; 17 I. C. C., 338), in which the Commission, while entering no formal order, condemned the making of allowances and divisions to tap lines for the traffic of proprietary mills, the trunk lines filed with the Commission cancellations of the tariffs which had provided for joint rates with the several petitioners

herein. Thereupon the Mansfield Railway & Transportation Co. and others filed complaints requesting that joint rates and through routes with the trunk lines be enforced. These complaints were made a part of investigation and suspension docket No. 11, under which the Commission entered into a full and complete investigation of the so-called tap-line situation in reference to lumbering operations in the Southwest, and more particularly in the States of Arkansas, Missouri, Louisiana, and Texas. It had theretofore entered upon an extensive general examination of industrial lines of all classes, and it had also, on specific complaints at an earlier period, considered the matter as it affected this particular region. (See *Central Yellow Pine Association v. V. S. & P. R. R. Co.*, 10 I. C. C., 193; *Central Yellow Pine Association v. I. C. R. R. Co.*, 10 I. C. C., 505; *Kaul Lumber Co. v. C. of G. Ry. Co.*, 20 I. C. C., 450.)

Pending the investigation and final order of the Commission, the cancellation of the joint rates had from time to time been suspended, withdrawn, re-filed, and again suspended. On April 23, 1912, the Commission filed its report in investigation and suspension docket No. 11, entitled "*The Tap Line case*" (23 I. C. C., 277), and on May 14, 1912, its supplemental report (23 I. C. C., 549), findings, and order.

It found that any allowance or division with respect to the products of the so-called proprietary

lumber companies of a large number of tap lines, including all of the tap lines that are petitioners herein, was unlawful. The order, however, did not affirmatively forbid the trunk lines to make allowances or divisions.

Petitions filed in this court by the petitioners herein were on motion dismissed for want of jurisdiction on the authority of *Proctor & Gamble Co. v. U. S.* (225 U. S., 282). Thereupon the Interstate Commerce Commission, pursuant to the request of these petitioners, amended its original order, and on October 30, 1912, entered the order which is now sought to be annulled. While the Commission adhered to the views theretofore expressed, it not only found as to each of the petitioners herein

“that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving the product of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowance or divisions out of the rate on account thereof are unlawful and result in undue or unreasonable preferences and unjust discriminations, as found in said reports”;

but in order to enable the petitioners herein to secure a judicial review of the legality of its action, it also expressly ordered the trunk line defendants

“to cease and desist and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the

above-named parties to the record in respect of any such above-described services."

While thus forbidding allowances and divisions in respect to services in moving the logs to and the lumber from the proprietary mills, the Commission further expressly ordered as to the tap lines that are petitioners in this court—

"That in case of the failure of the principal defendants (the trunk lines) to reestablish, on or before January 1, 1913, the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of the respective proprietary companies the Commission will upon appropriate petition herein enter an order requiring the establishment of such through routes and joint rates or enter upon an inquiry with respect thereto."

The terms of the original order were followed in dismissing, among others, the complaint of the Mansfield Railway & Transportation Co. in so far as it related to rates on products of the mill of the proprietary company. The amended order, however, instead of merely authorizing, now directed the trunk lines to reestablish through routes and joint rates with a number of tap lines not now before this court, provided that the rates from points on these lines should not exceed the junction point rates; and provided also that the divisions and allowances out of such joint rates on the products of the mills of their proprietary lumber companies should not exceed certain stated amounts.

The findings in the amended order differed from those in the original order by adding thereto the specific findings hereinabove set forth in reference to plant service, plant facilities, undue and unreasonable preferences, and unjust discrimination.

A careful consideration of the several reports and orders leads to the conclusion that the Commission held:

First. That each of the petitioning tap lines is a bona fide interstate common carrier.

Second. That in respect to the services rendered by them for the nonproprietary mills they acted in this capacity.

Third. That in respect to the services rendered by them for the proprietary companies they acted not in their capacity of common carriers but purely as a plant facility, and performed not a transportation but a plant service.

Fourth. That in respect to the services performed for their proprietary companies, each of the other tap lines with which the trunk lines were directed to reestablish joint rates, although under a limitation as to the amount of the division or allowance to be paid, not merely performed a transportation service but also in so doing acted in its capacity of an interstate common carrier.

The evidence before the Commission tending to show that the petitioning tap lines were originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned

or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, might have justified the Commission in finding that these tap lines were not in fact bona fide common carriers. We do not, however, consider this question as open, because, in our judgment, the Commission impliedly, if not expressly, held them to be interstate common carriers when it authorized and in effect directed the reestablishment of through routes and joint rates as to the nonproprietary traffic, inasmuch as the Commission is without authority to make such an order except as between interstate common carriers.

For the same and similar reasons we say that the Commission necessarily deemed the services rendered for proprietary companies by those tap lines not now before us with which the trunk lines were ordered to reestablish joint rates as to all traffic, to be not merely transportation services rendered by

or on behalf of the proprietary companies for which, under section 15 of the act, an allowance may be made, but transportation services rendered by the tap lines as interstate common carriers. Under the act a carrier may perform accessorial, nontransportation services for a shipper, provided this be done without unjust discrimination. It can not, however, be compelled so to do. It must, therefore, follow that, in the judgment of the Commission, the services which it compels a carrier to perform are necessarily transportation services. Moreover, while under section 15 a carrier may permit a shipper, directly or indirectly, to render a service connected with transportation, and may make a just and reasonable allowance therefor, it can not be compelled to permit such substituted performance of any of its own obligations. It follows, therefore, that when the Commission, instead of merely fixing a maximum allowance to be paid to the tap lines or to the proprietary companies for switching and other services rendered with the consent of the trunk line in connection with through shipments, directs the establishment by the trunk lines of joint rates with such tap lines, and the payment of not exceeding a specified division out of such joint rate for such services, it necessarily holds such services to be not merely services connected with transportation but the services of an interstate common carrier engaged in such transportation.

That a common carrier may, however, as to some of its work, act in a strictly private capacity is well

settled (*A., T. & S. F. Ry. v. Grant Brothers*, 228 U. S., 177); and that it may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, has been held by this court in *Crane Iron Works v. U. S.*, No. 55, June 7, 1912.

Whether or not a payment provided for in the tariff for such a service would be per se illegal in the absence of an order by the Commission forbidding it (*C. & A. Ry. v. U. S.*, 156 Fed., 558; *Am. S. R. Co. v. D., L. & W. Ry.*, 207 Fed., 733, reversing s. c. 200 Fed., 652), it is clearly within the power of the Commission to prohibit such payment (*Am. S. R. Co. v. D., L. & W. Ry.*, *supra*).

If, then, the Commission was justified in finding that these interstate common carriers, the petitioning tap lines, were mere plant facilities as to their proprietary companies, and that the services rendered by them in hauling logs to and lumber from the proprietary mills were merely the plant services of plant facilities, its order forbidding any division or allowance therefor would be valid and proper.

Whether or not this is a justifiable finding of fact is to be determined, in the first instance, by the Interstate Commerce Commission. When, as in these cases, a full and fair hearing has been granted, the Commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the

record before it or are arbitrary in being based upon improper distinctions and considerations.

No constitutional question can properly be involved in such a case, inasmuch as the tap lines, if they are in fact acting only as plant facilities in respect to the proprietary companies, can have no constitutional right to that which is necessarily an illegal allowance, however much they may be injured financially by the denial thereof.

Nor can the Commission be charged with such arbitrary action as would justify an annulment of its orders in respect to the petitioning tap lines merely because of a different finding as to some other tap lines, whose history, physical conditions, and relations to and service for the proprietary companies are in many respects like, although necessarily not identical with, those of the petitioning tap lines and their proprietary companies; for though the orders are made in one proceeding, they are separate and distinct as to each of the tap lines, and are expressly based upon a careful investigation of and separate findings in relation to each of the companies. Moreover, an erroneous conclusion by the Commission as to the real nature of the services of one or more of the tap lines toward its or their proprietary companies would of itself be no justification for the annulment of the findings and the orders as to some other companies on the ground of arbitrary action, if the latter are based upon substantial evidence. Arbitrary action can, however, be predicated on a disregard by the Commission of

the very criteria which it adopts to determine the ultimate questions of fact, or on the adoption of distinctions without real differences.

The important questions, therefore, to be considered by this court are:

First. Whether the Commission acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be acting as a mere plant facility of and performing mere plant service for the proprietary companies; or,

Second. Whether in each of these cases there was substantial evidence to justify the ultimate findings and the consequent order of the Commission; not whether this court would have drawn the same conclusion from conflicting evidence; not whether, in the judgment of this court, it is expedient or inexpedient to encourage the building of these tap lines by the large lumber interests of the southwest, but solely whether in the evidence before it there can be found a substantial basis for the Commission's conclusions.

Before determining these questions, there are some subsidiary matters which require attention.

1. It is urged upon us that the petitions herein should be dismissed on the ground either that, though affirmative in form, they are nevertheless negative in substance, or that the petitioners in this court are not those against whom the order is directed. This motion must be denied. The amended order is clearly an affirmative order. It expressly

forbids certain action because of its illegality. Disobedience would involve not merely the penalties prescribed by the act for illegal transactions, but the other and heavier penalties therein prescribed for violation of the orders of the Commission.

Inasmuch as the petitioners herein, though not the parties commanded in the order to desist from the illegal action, are directly and financially affected by the orders in question, they have a standing as complainants in a court of equity. (*I. C. C. v. Diffenbaugh*, 222 U. S., 42.)

2. The petitioners in cases Nos. 90 and 91 seek not only to have the order of the Commission annulled, but pray also that the trunk lines may be ordered to perform certain contracts made with them. As this court is without jurisdiction to enforce such contracts, this additional prayer may be disregarded. Neither joining a cause of action over which this court has no jurisdiction with one over which the court has jurisdiction nor the joining of unnecessary parties defendant would, however, justify the dismissal of the petitions.

3. The Interstate Commerce Commission has moved to strike out the testimony taken by this court on the ground that the only real issues in the case, viz., whether or not there was substantial evidence before the Commission to support its order and whether or not it acted arbitrarily, not in the sense of denying a full and complete hearing, but in the sense of acting in utter disregard of the evidence or upon distinctions not based upon the evi-

dence, must be determined exclusively by the record as made before the Commission. In our judgment this motion must be granted.

Under the law as it existed prior to the amendment of 1906, the findings of the Commission on the facts were expressly given only prima facie effect. For this reason the courts, while stating that the carriers ought not to withhold evidence from the Commission and for the first time produce it before the court, nevertheless held that neither party was restricted in the courts to the evidence before the Commission on the question of reasonable rates, unjust discriminations, or dissimilarity of circumstances. (*C., N. O. & T. P. Ry. v. I. C. C.*, 162 U. S., 184; *I. C. C. v. Alabama Midland Ry. Co.*, 168 U. S., 114.)

Under the amendment of 1906, however, the determination of the Commission as to the facts is final and binding, subject to the qualification that it must be supported not by a mere scintilla of proof, but by substantial evidence. (*I. C. C. v. Union Pacific R. R.*, 222 U. S., 541, 548, 550.) Whatever may be the rule as to the admission of additional evidence when an order of the Commission is attacked as making a rate that is confiscatory, we are of the opinion that when, as in these cases, the real basis of the complaint is that the findings of the Commission are unsupported by substantial evidence or are arbitrary, as based upon distinctions shown by the evidence to be improper, the correct-

ness of such allegations can be tested only by the evidence that was before the Commission.

If, after the hearing by the Commission and either before or after its order shall have been entered, new evidence should be discovered, or a change should have taken place such as should cause the Commission to modify or reverse its findings and order, the proper remedy is to apply for a rehearing, to present a supplemental complaint, or to file a new complaint before the Commission. Any and all evidence bearing upon the questions of fact involved in the matters adjudicated should, however, first come before the Commission in order that it may be able to determine the ultimate facts in the case.

We come, then, to a consideration of the main questions. Was there, as to each of these petitioning tap lines, substantial evidence to justify the findings of the Commission? Did the Commission differentiate the several companies arbitrarily on distinctions or differences not justifiable in law? While evidence was given as to each road separately and specifically, and while the report deals with each road separately, a considerable mass of testimony and a considerable portion of the reports cover the entire situation. It is apparent therefrom that very real evils existed, evils demanding correction.

Tap lines, in many instances, were receiving amounts entirely disproportionate to the services

rendered by them; amounts based, not upon the cost or the value of the services rendered, if they were transportation services, but upon other and totally illegal considerations. Such payments were, in a large measure at least, secret rebates, and to that extent unlawful. Many tap lines received no allowances for work practically identical with that performed by other lines to which most liberal allowances were given. Moreover, while prior to 1906 divisions and allowances, especially in the form of secret rebates, were made directly to the mills, after the amendment of 1906 the test of the right to receive them, as fixed by the trunk lines, was incorporation of the tap line as a common carrier, although it is clear that incorporation is not essential to the status of an interstate common carrier.

The power of the Commission to prevent such rebates and unjust discriminations is beyond question. It is to be accomplished, however, not by enjoining payments, which the law itself recognizes as legal, but by requiring equality of treatment and by regulating the sums to be paid, so that they will be fairly proportioned to the services rendered. That the Commission is not authorized to forbid lawful payments merely because, in its judgment, unjust discriminations result therefrom, or to declare that to be unjust discrimination which results only from a perfectly lawful payment is apparent from the case of *I. C. C. v. Diffenbaugh*

(222 U. S., 42). The invalidity of the Commission's finding, when unsupported by the evidence, that certain services are plant facility and not transportation services, is also attested by the same case.

In the Diffenbaugh case the Commission held that on grain passing through an elevator and mixed, treated, weighed, or inspected therein, no allowance for elevation might be made to the elevator owner if he had any interest in the grain itself. The basis of the order was its determination that the elevation under such circumstances was not transportation within the act, and that an unjust discrimination resulted in favor of the elevator owner, against other grain dealers who did not have elevators, even though the payment was an honest one, limited to the bare cost of elevation, inasmuch as he obtained undue advantages by being thereby enabled to perform other services in respect to the grain. But the courts held that unjust discrimination could not be based upon a lawful and proper payment and that such a service was in fact a transportation service. Mr. Justice Holmes says (p. 46):

"The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported * * * he shall pay for them."

"The only permissive element being that the commission may determine the maximum " to be paid.

Judge Sanborn, writing the opinion of the Circuit Court *en banc*, said (176 Fed., 409, 418):

“ Reasonable compensation for transfer services may not be denied lawfully because there is a possibility that those who receive it may at some future time violate the law and secure rebates or effect discrimination. There is no more power in the Commission to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property, because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.”

Equally may it be said that a reasonable division out of joint rates can not be denied a common carrier for transportation services because of any past or present derelictions, or even the fear of further violations of the law. The law itself fixes the method of punishment for such wrongs; it does not include therein a denial of proper compensation for proper services.

Common ownership of a railroad and an industry facilitates the making of discriminations and the covering up of rebates. For this reason Congress enacted the commodities clause, which forbids a railroad from transporting any commodity—

“ manufactured, mined, or produced by it or under its authority, or which it may own in whole or in

part or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

But Congress at the same time expressly excepts "timber and the manufactured products thereof" from this prohibition. It has thereby made it manifest that, in its judgment, the possible evils of secret rebates and unjust discriminations which might result from the common ownership of a railroad and a lumber plant do not offset the advantages that may be derived therefrom. It is clear, too, as well from the report and the evidence before the Commission, particularly the concurring opinion of Mr. Commissioner Prouty, as from the position taken by the State of Louisiana in this court in support of the contentions of these petitioners that these advantages are very real; that the vast forests of the country will not be developed without branch or tap lines running from the great trunk lines into the woods themselves, near which sawmills are most advantageously to be located; and that in a large measure the capital for the construction of such branch or tap lines must be raised by those who control the forests and the mills.

Common ownership or control of a lumber mill and a railroad can not, therefore, be prohibited by the Commission or be made the basis of a denial to a railroad of rights accorded another road not so owned.

Counsel for petitioners strenuously urge that this is the real basis for the action of the Commission in classifying many of these tap lines. Despite some expressions in the report which would seem to support this conclusion we accept the Commission's express recognition of this limitation of its power and its disclaimer both in this and in later cases (see *McCloud Lumber Co. v. S. P. Co.*, 24 I. C. C., 89, 94) of the adoption of this test.

What, if any, general rules did the Commission formulate? While it is stated at page 293 of the report—

“that the question is not susceptible of solution on general grounds; * * * that the only safe course is to ascertain and determine on the facts disclosed in each case what is the real relation between the tap line and the (proprietary) industry,”

the Commission, nevertheless, further says:

“It is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. * * * By their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as three miles from their own lines. * * * The transportation (in such case) commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the

trunk line to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. * * * It is not lawful when the lumber company refuses to permit the trunk line to do the work. No allowance, however, ought to be made by a trunk line to a lumber company where the mill is within, say, 1,000 feet of the trunk line. We should regard an allowance under such circumstances as a mere device to effect an unlawful payment to the lumber company. We should take the same view of an allowance where a short switch track to the mill has been torn out or is still available but not used in order to give the appearance of a longer haul to the mill over a spur or switch track constructed by the lumber company or by its tap line.

“ Where a mill is distant more than three miles from a trunk line and is connected with the latter by a tap line not recognized by this Commission as a common carrier in respect of the service performed for its proprietary lumber company, no allowance or division may lawfully be made by a trunk line either to the lumber company or to its tap line. Such a lumber company, although using rails, stands in no better position under the law with respect to its lumber than does a lumber company that uses other means of delivering its lumber to a public carrier. But where a mill is more than three miles distant from a trunk line and is connected

with it by a tap line organized as a common carrier and so recognized by this Commission, the mill is to be regarded as a shipping point equally with all other mill points in the extensive rate group which the trunk-line carriers have defined in this territory; and the lumber rate is to be regarded as in effect from the mill, the tap line being entitled to a division thereof * * *."

In a concurring opinion, Prouty, C., however, said (p. 344):

"I do not fully concur in the suggestion that main-line carriers may make to the owners of private railroads not common carriers allowances for the movement of lumber from the mill to the main line. I doubt whether this is a transportation service within the meaning of section 15."

In effect the Commission holds:

First. Switching service within three miles of a trunk line is by custom included in the through rate.

Second. Such switching is a transportation service.

Third. For switching products of a proprietary mill located within the three-mile limit, no division of the through rate may be made, but an allowance, under section 15, may be paid either to the industry or to its tap line, if the trunk line prefers to permit the industry or tap line to do this work.

Fourth. For switching products of a nonproprietary mill an allowance may be given, and, in the case of a common carrier tap line, a division out of the through rate should be made.

Fifth. But no such allowance or division shall be made if the proper switching distance is or should be less than 1,000 feet.

Sixth. The benefit of the blanket rate is to be extended beyond the three-mile switching limit for a mill on or connected by switch (presumably not over three miles long) with a common carrier tap line and through the latter with a trunk line, provided only that the mill be not a proprietary industry as to the tap line. Neither allowance nor division is to be given the tap line for switching the products of such a proprietary mill.

In our judgment these distinctions must be regarded as arbitrary and without justification as a matter of law. In determining the proper boundaries of free switching or blanket-rate service, the Commission could, of course, take into consideration, or even be guided by the practice of the roads as to the distances within which switching should be free.

In view of its finding as to the custom, it could have limited the blanket rate to mills within three miles of a trunk line. This, however, it did not do. On the contrary, it expressly ordered that the blanket rate be extended to mills on (or probably within three miles of) a common carrier tap line that connected with a trunk line, irrespective of the distance of the mills from the trunk line, provided only that they were nonproprietary. The alleged custom was thereby disregarded.

Moreover, a custom relating to the territorial extent of a blanket rate can not, in the nature of things, be determinative of the character of the service. If switching from 1,000 feet to three miles from a proprietary mill to a trunk line by means of a tap line is a transportation service, as the Commission (Prouty, C., doubting), in our judgment, correctly held, then switching for a longer or a shorter distance under similar conditions can not be a plant service. The distinction between transportation and plant service can not be dependent upon the distance that the goods are moved.

Inasmuch as the reports are specifically made a part of the order, and as the Commission therein expressly permits payment of an allowance to a proprietary mill located within the three-mile limit (p. 603, Victoria, Fisher & Western R. R., No. 93), we do not interpret the finding in the original and amended orders that the service for the proprietary companies is a plant service and an allowance therefor illegal as intended to apply to a switching service from 1,000 feet to three miles. As we have already stated the possibility, particularly in the case of short switches, of an abuse or illegal use by a railroad of the right granted to it by statute to make an allowance for services connected with transportation which, in its discretion, it permits the shipper to perform does not vest the Commission with power absolutely to forbid its exercise as an unjust discrimination. It may cut down the

compensation if it be too high; it may enforce any reasonable regulations to prevent unjust discrimination, but it may not forbid such payments as unlawful because the service is relatively either small or great.

Nor may the line be drawn on the basis of what is and what is not essential to the industry. Transportation would not flourish without manufacturing; manufacturing could not be successfully carried on without transportation; they are distinct activities; but both are essential to the industry. Raw materials must be brought to and the finished product must be carried from the mill; whether any particular service involving an actual hauling of the goods is transportation or industrial depends upon whether, on the one hand, it is an interindustry act, a step in the manufacturing process, or, on the other hand, a movement of raw material from without to the mill or of finished product from the mill toward the market. Every actual carrying of each part of the material or product is, of course, not a transportation service; the *Crane Iron Works case* (*supra*) well illustrates this. In that case, as in other cases therein cited (*General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C., 237; *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I. C. C., 246), it was held that the hauling between buildings of an extensive plant was a part of the manufacturing, not of the transportation operations; that the transportation ended, as to raw materials, when the common carrier had

performed all that it could have been required to perform and all that it did for nonproprietary mills—that is, when it made delivery at some point on the plant; that any further activity on the part of the tap line common carrier within the plant itself could not have been compelled and was not a transportation service for which the trunk line could pay either an allowance to the industry or a division of the joint rate to the tap line as a common carrier.

But the situation here is totally different. The actual service in transporting logs to or lumber from the proprietary mills in no respect differs from that performed for independent mills; the carriage over the tap line ranges from a short switch to a many-mile haul; its purpose, so far as the lumber is concerned, is not to serve the industry in its internal operations, but directly to serve both the mill, as shipper, and the general consuming public, as consignees and purchasers. When these tap lines, which it must again be emphasized, are not private carriers, but are admittedly for some purposes interstate common carriers, take the carloads of finished lumber at the mills for the purpose of either hauling or switching them to a trunk line so that they may reach their ultimate destination beyond the State, the interstate transportation has actually begun.

As to the logs, the conditions, while not identical, are not dissimilar. The hauling, it is true, is primarily for the benefit of the mill; consignee and

consignor are one. If the service had continued to be what it originally was in most of these cases, by a private carrier for the one industry alone or from the forests to the directly adjacent mills, forest and mill being in fact one entire plant, so that the haul was interindustrial, it might well be held to be a plant-facility service (*Kaul Lumber Co. v. C. of G. Ry. Co.*, 20 I. C. C., 450, 455); but as Prouty, C., says in that case:

"The thing done is properly the function of a common carrier and not necessarily of a plant facility. Great quantities of logs are transported to mills for manufacture by railroads as common carriers under published tariffs."

The Commission might have limited the blanket rate to the lumber either directly or by forbidding milling in transit. This, however, was not done. On the contrary, the order directing reestablishment of the old rates as to nonproprietary mills sanctioned the extension of the blanket rates not only to the mill, but back to the forests with the milling in transit privilege. That applied to each of the petitioning tap lines and is in itself a recognition of their status as interstate common carriers not only of lumber but also of logs.

Again, it is immaterial that in an early stage of the industry or in small plants logs are hauled to and lumber from the mills by horse and wagon and not by railroad. When this is the method of bringing the goods to the trunk line the allowance may or should be forbidden not because of the na-

ture of the service—clearly it is transportation when performed by a common carrier expressman—but because of the means used to perform it. The allowance to be made by a trunk line under section 15, and the payment of which can not be forbidden (*I. C. C. v. Diffenbaugh, supra*), is only for a service that is a part of or for an instrumentality to be used in the transportation which the trunk line would otherwise be compelled to perform, not for a service which is neither part of nor directly connected with the trunk line's transportation even though it be transportation in its relation to the industry.

The fact that these tap lines connect directly with the private logging roads of the proprietary mills; that the latter alone run into the forests; that the point at which the common-carrier service begins is more or less arbitrarily determined solely in the interest of the proprietary mills; that other mills must haul their logs by team to the tap line or must purchase them in the open market, and that thereby these proprietary mills have great commercial advantages over their competitors does not in any manner affect the matters now before us. As the Supreme Court has said in the *Diffenbaugh case (supra)*:

“The law does not attempt to equalize fortune, opportunities, or abilities.”

As the actual service rendered by the tap line from the time it takes the logs until it delivers the

finished product to the trunk line is the same for proprietary and nonproprietary mills, and as this is held to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

In view of our conclusions as to the arbitrary character of the distinctions on which the order of the Commission is based, it becomes unnecessary for us to consider the evidence as to each petitioning tap line separately.

It follows, therefore, that the Commission was not only without power to forbid any allowance whatsoever to be made by a trunk line to the petitioning proprietary industries for switching either less than 1,000 feet or more than 3 miles, but it was also without power to prohibit the making of joint rates by the trunk lines and the petitioning tap lines and the payment by the former to the latter of some division thereof for its services in hauling logs to and lumber from the petitioning proprietary mills, and its order must to this extent and as to these petitioners be annulled.

The Commission is, of course, fully empowered to regulate the amount of allowances and divisions so as to prevent rebates and unjust discriminations. In this way, as well as by the prohibition of or prosecution for certain illegal practices mentioned in the report, whereby proprietary mills obtain undue advantages, most of the evils which the Commission has sought by its order to prevent, will be checked. But such as are inherent in the common

ownership of industrial and common carrier transportation facilities do not constitute legal wrongs and must remain unless and until Congress shall extend the scope of the commodities clause.

In so far as the order of the Commission is negative, in dismissing the complaint filed to secure an order compelling the reestablishment of through routes and joint rates, we are without jurisdiction to determine its validity.

A decree will be entered in accordance with the views herein expressed, *and it is so ordered.*

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In the Supreme Court of the United States, October Term, 1913.

No. 829.

UNITED STATES OF AMERICA et al., Appellants,

v.

LOUISIANA & PACIFIC RY. Co. et al.

No. 831.

UNITED STATES OF AMERICA et al., Appellants,

v.

WOODWORTH & LOUISIANA CENTRAL RY. Co., LTD.

No. 833.

UNITED STATES OF AMERICA et al., Appellants,

v.

MANSFIELD RY. & TRANSPORTATION Co. et al.

No. 835.

UNITED STATES OF AMERICA et al., Appellants,

v.

VICTORIA, FISHER & WESTERN R. R. Co. et al.

No. 837.

UNITED STATES OF AMERICA et al., Appellants,

v.

BUTLER COUNTY R. R. Co.

Matter Applicable to the Foregoing Cases to be Printed in a Single Volume.

To the Clerk:

In pursuance of Paragraph 9, of Rule 10, Rules of the Supreme Court, the United States, appellant, hereby designates the following matter to be printed in a single separate volume, for use in the argument of the foregoing appeals.

1. The Report and Supplemental Report, and the Order and Amended Order of the Interstate Commerce Commission (50 printed copies of each herewith for the use of the printer).

2. Order of the Interstate Commerce Commission, December 20, 1910, in Docket No. 3400, Sub. 7. I. & S. Docket No. 11-A.

3. From printed Volume I, entitled "Transcript of Stenographer's Notes of Hearings Held at New Orleans, La., December, 1910," etc., as follows:

Page 1, beginning with and including the words "Before the Interstate Commerce Commission" to and including the top of Page 22, ending with the words "as they are called."

Page 109, beginning with and including the words "New Orleans, La., December 9, 1910," to and including the first half of Page 114, ending with the words "not been called, who wish to enter their appearance."

Page 636, after first inserting the date, thus: (New Orleans, La., December 13, 1913,) beginning with the words "Commissioner Harlan: The Woodworth & Louisiana Central and" to and including the first half of Page 636, ending with the words "until 9.30 tomorrow morning."

Page 684, beginning with the words "New Orleans, La., December 14, 1910," to and including the top of Page 769, ending with the words "and is attached hereto)."

Page 787, beginning with the words "Woodworth & Louisiana Central Railway Company," to the end of said Volume I.

4. From printed Volume II, entitled "Transcript of Stenographer's Notes of Hearings held at New Orleans, La., December, 1910," etc., as follows:

Page 1189, after first inserting the date, thus: (New Orleans, La., December 17, 1910,) beginning with the words "after recess" to and including that part of Page 1195 ending with the words "we will have to adjourn."

Page 1566, after inserting the date, thus: (New Orleans, La., December 14, 1910,) beginning with the words "Victoria, Fisher & Western Railway Company," to and including that part of Page 1582 ending near the bottom with the words "in the main room."

5. From printed Volume III, entitled "Transcript of Stenographer's Notes of Hearings Held at St. Louis, Mo., January, 1911," etc., as follows:

Page 1680, beginning with the words "St. Louis, Mo., January 23, 1911," to and including the first half of Page 1689, ending with the words "and having been postponed from New Orleans."

Page 2037, beginning with the words "St. Louis, Mo., January 26, 1911," to and including Page 2098, omitting Pages 2099, 2100, and 2101, and continuing with all of Page 2102, to and including Page 2114.

6. From printed Volume IV, entitled "Transcript of Stenographer's Notes of Hearings Held at Chicago, Ill., January, 1911," etc., as follows:

Page 2638, after inserting the date, thus: (Chicago, Ill., January 30, 1911,) beginning with the words "John H. Kirby was called as a witness," to and including the first half of Page 2749, ending with the words "(Witness Excused)."

Page 2840, beginning with the words "George K. Smith was called as a witness," to the end of the volume.

7. All of printed Volume V, entitled "Exhibits Filed in the Proceedings Before the Interstate Commerce Commission," etc., consisting of 105 printed pages.

8. The opinion of the Commerce Court (50 printed copies herewith for the use of the printer).

JNO. W. DAVIS,
Solicitor General.

Supreme Court of the United States, October Term, 1913.

No. 829 and Nos. 831, 833, 835, Known as the Tap Line Cases.

UNITED STATES OF AMERICA et al.

v.

LOUISIANA & PACIFIC RAILWAY COMPANY et al.

January 15, 1914, received of counsel for the United States true copies of memorandum to be filed with the Clerk by the appellants designating the portions of the record to be printed in each of the foregoing cases for the hearing of the appeals.

LUTHER M. WALTER,

Solicitor for All Appellees & R. R. Com. of Louisiana.

Jan. 16, '14.

[Endorsed:] File Nos. 23,980, etc. Supreme Court U. S. October term, 1913. Term Nos. 829, etc. The United States et al., Appellants, vs. Louisiana & Pacific Railway Company et al. Designation by The United States as to printing records and proof of service of same. Filed January 21, 1914.

In the Supreme Court of the United States, October Term, 1913.

No. 829.

UNITED STATES and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

LOUISIANA & PACIFIC RAILWAY COMPANY et al.

No. 830.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellants,

v.

LOUISIANA & PACIFIC RAILWAY COMPANY et al.

No. 831.

UNITED STATES and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY et al.

No. 832.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellants,

v.

WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY et al.

No. 833.

UNITED STATES and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

MANSFIELD RAILWAY & TRANSPORTATION COMPANY et al.

No. 834.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellants,

v.

MANSFIELD RAILWAY & TRANSPORTATION COMPANY et al.

No. 835.

UNITED STATES and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al.

No. 836.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellants,

v.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY et al.

No. 837.

UNITED STATES and INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

BUTLER COUNTY RAILROAD COMPANY.

Designation and Stipulation.

In order to avoid duplication of printing, the designations to print and instructions to omit, filed by the United States are hereby adopted by all of the appellants in the foregoing appeals.

The United States and the Interstate Commerce Commission shall bear one half of the cost of the printing of the records according to such designations and instructions, and The Atchison, Topeka and Santa Fe Railway Company and Gulf, Colorado and Santa Fe Railway Company shall bear the other half thereof, and the Clerk is requested to proceed accordingly.

JNO. W. DAVIS,

Solicitor General.

CHAS. W. NEEDHAM,

Solicitor for Interstate Commerce Commission.

GARDINER LATHROP &

J. L. COLEMAN,

*Solicitors for The Atchison, Topeka and
Santa Fe Railway Co. and Gulf, Colo-
rado and Santa Fe Railway Co.*

January 17, 1914.

[Endorsed:] File Nos. 23,980 to 23,988. Supreme Court U. S. October term, 1913. Term Nos. 829 to 837. The United States et al., Appellants, vs. Louisiana & Pacific Railway Company et al. Designation and stipulation as to printing records. Filed January 21, 1914.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

UNITED STATES AND INTERSTATE COM-
merce Commission, appellants,
v.
LOUISIANA & PACIFIC RAILWAY COMPANY
et al. } No. 829.

ATCHISON, TOPEKA & SANTA FE RAILWAY
Co. et al., appellants,
v.
LOUISIANA & PACIFIC RAILWAY COMPANY
et al. } No. 830.

UNITED STATES AND INTERSTATE COM-
merce Commission, appellants,
v.
WOODWORTH AND LOUISIANA CENTRAL
Railway Company et al. } No. 831.

ATCHISON, TOPEKA & SANTA FE RAILWAY
Co. et al., appellants,
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WOODWORTH AND LOUISIANA CENTRAL
Railway Company et al. } No. 832.

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ATCHISON, TOPEKA & SANTA FE RAILWAY Co. et al., appellants, v.	} No. 834.
MANSFIELD RAILWAY & TRANSPORTATION Company et al.	
UNITED STATES AND INTERSTATE COM- merce Commission, appellants, v.	} No. 835.
VICTORIA, FISHER & WESTERN RAILROAD Company et al.	
ATCHISON, TOPEKA & SANTA FE RAILWAY Co. et al., appellants, v.	} No. 836.
VICTORIA, FISHER & WESTERN RAILROAD Company et al.	
UNITED STATES AND INTERSTATE COM- merce Commission, appellants, v.	} No. 837.
BUTLER COUNTY RAILROAD COMPANY.	

APPEALS FROM THE UNITED STATES COMMERCE COURT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled causes, known as the Tap Line Cases, for hearing at this term.

The appeals are from final orders or decrees of the Commerce Court entered November 28, 1913,

annulling an order of the Interstate Commerce Commission.

As grounds for this motion it is shown—

A "tap line" is a railroad owned by a company organized for the purpose of taking over and operating the tracks, logging cars, and other equipment of a proprietary company engaged in the business of cutting and sawing timber in order to secure divisions from the trunk lines on the traffic of the proprietary lumber company. In each instance the "tap line" company and the lumber company are under a common ownership, management, and control.

The Interstate Commerce Commission investigated 99 such tap line companies and their arrangements with the proprietary lumber companies and the trunk lines. In certain instances, including those of appellees Louisiana & Pacific Railway Company, Woodworth & Louisiana Central Railway Company, and Mansfield Railway & Transportation Company, it directed the discontinuance of any allowances whatever by the trunk lines on the traffic of the proprietary lumber company. In other instances, including those of appellees Victoria, Fisher & Western Railway Company and Butler County Railroad Company, it permitted allowances by the trunk lines for the switching services performed by the tap lines.

The Commerce Court, in a single opinion, annulled the order of the Commission in so far as it applied to the five appellee railway companies. The reasons upon which the Commerce Court rested its conclu-

sions are such as to affect the entire investigation by the Commission of all the tap lines. Many other cases will be controlled by the final decision of these appeals.

Important questions of jurisdiction are also raised in the record by the appellants.

The order of the Commission was entered October 13, 1912, effective for two years. Unless the cases are advanced, the order will expire by its own limitation before any hearing can be had.

The public interest is involved.

The priority suggested is also authorized by section 2 of the Act of June 18, 1910, 36 Stat. 539, 542.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1914.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

UNITED STATES AND INTERSTATE COM-
MERCE COMMISSION, APPELLANTS,
v.
LOUISIANA AND PACIFIC RAILWAY CO. ET
AL. } No. 829.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY CO. ET AL., APPELLANTS,
v.
LOUISIANA AND PACIFIC RAILWAY CO. ET
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UNITED STATES AND INTERSTATE COM-
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WOODWORTH AND LOUISIANA CENTRAL
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TION CO. ET AL. } No. 833.

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MANSFIELD RAILWAY AND TRANSPORTA- TION CO. ET AL.	

UNITED STATES AND INTERSTATE COM- MERCE COMMISSION, APPELLANTS, v.	} No. 835.
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VICTORIA, FISHER AND WESTERN RAIL- ROAD COMPANY ET AL.	

UNITED STATES AND INTERSTATE COM- MERCE COMMISSION, APPELLANTS, v.	} No. 837.
BUTLER COUNTY RAILROAD COMPANY.	

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are appeals from decrees of the Commerce Court (209 Fed. 244, 260) which annulled and set aside an order of the Interstate Commerce Commission entered on the 30th day of October, 1912, in so

far as that order refused to reinstate joint rates between the petitioners and certain trunk lines and to compel the payment by the latter to the former of allowances upon the transportation of the logs and lumber of the lumber companies by which the petitioners are severally owned or controlled.

Nos. 830, 832, 834, and 836 are sister cases, being appeals from the same decrees taken by the Atchison, Topeka & Santa Fe Railway Company, one of the trunk lines interested.

The order thus annulled was the outcome of an investigation by the Commission into the relations existing between the so-called Tap Lines in the lumber industry, their proprietary lumber companies, and the trunk line carriers in the yellow pine districts of Missouri, Arkansas, Texas, and Louisiana.

This investigation was indirectly due to the reports of the Commission in *Star Grain & Lumber Company v. Atchison, Topeka & Santa Fe Railway Company*, 14 I. C. C. 364 (June 23, 1908), 17 I. C. C. 338 (December 7, 1909). Prior to these reports joint tariffs had been maintained between certain trunk lines and lumber tap lines, but with the views of the Commission expressed in these two reports as a justification of their action the trunk line carriers undertook to cancel the joint tariffs theretofore maintained. Thereupon petitions were filed with the Commission by sundry tap lines, including the appellees, seeking the establishment or reestablishment of through routes and joint rates with their connecting trunk lines and the payment of allow-

ances or divisions out of such joint rates, particularly upon the traffic of their proprietary lumber companies. The appellees, Louisiana and Pacific Railway Company, Woodworth and Louisiana Central Railway Company, Victoria, Fisher & Western Railroad Company, and their affiliated lumber companies, filed no formal petitions, but the Commission at their request treated the case as though they had done so.

The investigation ultimately embraced over 250 tap lines throughout that region. On May 14, 1912, the Commission filed its report and entered an order dismissing the several petitions of the appellees Louisiana & Pacific Railway Company, Woodworth & Louisiana Central Railway Company, Mansfield Railway & Transportation Company, and Victoria, Fisher & Western Railroad Company, and granting to the appellee Butler County Railroad Company divisions or allowances to a limited amount. This order was amended and modified by a subsequent order of October 30, 1912, again declaring the four appellees first named not entitled to the relief prayed and any allowances or divisions to them unlawful, granting to the Butler County Railroad Company limited allowances, and requiring the principal trunk line defendants to abstain from making such unlawful allowances. This order went against 92 railroads connected with lumber companies besides those involved in the present appeals.

The appellees filed their several petitions in the Commerce Court praying that this order might be

enjoined, set aside, and annulled. The Government answered the petitions on the merits and also assailed the jurisdiction of the court.

In so far as the order was held to be affirmative it was annulled, and the parties were left as they were found by the Commission. These appeals were then taken.

DESCRIPTION OF THE INDIVIDUAL APPELLEES.

Both the Commission and the Commerce Court declared that each case must rest upon its own facts. The Commission therefore set forth at some length the circumstances and history of each appellee. The facts so found are amply supported by the evidence, which will be summarized.

LOUISIANA & PACIFIC RAILWAY COMPANY.¹

Hudson River Lumber Company, King-Ryder Lumber Company, Calcasieu Long Leaf Lumber Company, and Longville Lumber Company are Missouri corporations owning extensive tracts in Louisiana from which they cut timber and manufacture it into lumber at their mills located respectively at De Ridder, Bon Ami, Lake Charles, and Longville (R. 15). The total capital stock of all the companies is \$2,065,000, of which R. A. Long owns 83 per cent, the remainder being held princi-

¹ The evidence before the Commission is found in Volume I, pages 636-666 and 684-769. The findings of the Commission are at 23 I. C. C. 591. Opinions, Orders, etc., 111. R. 24.

pally by his few associates in the business, and relatives (R. 11, 12, 13). C. B. Sweet, an associate of R. A. Long, is president of all the companies, and a minority stockholder (R. 65).

Long-Bell Lumber Company, a Missouri corporation, acts as the selling agent for the products of the four lumber companies, and is engaged in the wholesale and retail lumber business (R. 15). R. A. Long is president (R. 64).

Prior to 1906 each of the mills operated its own switch tracks as part of its facilities in cutting timber and manufacturing lumber. The respective railroad companies with their own engines ran over the tracks of the lumber companies to take the cars out. Then the several lumber companies, as shippers, transacted all business directly with the trunk line railroads, from whom they received allowances.

The Hepburn Act, which amended the Elkins Act, was approved June 29, 1906, to become effective August 28, 1906. In that year the organization of the Louisiana & Pacific, which up to that time had been a mere paper railroad, was completed by the lumber companies (except Longville Lumber Company) transferring to it the logging roads, tramroads, spurs, and connections, together with all cars, engines, tools, equipment, and appurtenances. The Louisiana & Pacific issued its bonds in payment. The evidence shows that "this railroad was made up by connecting together three lumber railroads companies"; three railroads "then belonging to lumber compa-

nies." It has a dirt roadbed (Vol. 1, R. 637, 639, 760). July 1, 1908, Longville Lumber Company also conveyed its entire railroad equipment to the Louisiana & Pacific (R. 121).

Louisiana & Pacific has an authorized capital stock of \$200,000, of which \$51,000 is outstanding. R. A. Long, who is president, owns \$40,290 of the stock. It has a bonded indebtedness of \$442,300 of which the four lumber companies and their agents hold approximately \$260,000 (R. 11, 24, 25). Only \$30,000 were issued for cash (Vol. 1, R. 725).

Messrs. Long, Sweet, Bannister and Rickey are all officers in all of the companies (Vol. 1, R. 640).

The four lumber companies, the agency company, and the railroad company thus constitute six interlocking corporations, under a common ownership, management, and control, jointly operating in the State of Louisiana, with headquarters in a single office in the R. A. Long Building, Kansas City, Missouri, dominated by a single individual owner (Vol. 1, R. 690, 691).

The sole object of building the Louisiana & Pacific was to get competition among five or six trunk line railroads. "We were out to get as much money as we could out of it with these railroads and built for these connections." (Vol. 1, R. 753).

October 13, 1906, the six companies and the Colorado Southern, New Orleans & Pacific Railroad Company (owned and controlled by the Frisco Company)

entered into a contract for the term of 15 years, agreeing (R. 126)—

That the six companies would route 50 per cent of all the products of their mills over the Frisco (R. 128, 129);

That the Louisiana Company and the Frisco Company would enter into joint tariffs (R. 129);

That no per diem charges would be made by the Frisco Company or the Louisiana Company on freight cars delivered by either to the other until the expiration of six days after the delivery (R. 130);

That the Frisco Company would have the exclusive right to fix and determine all interstate rates applicable over the lines of the Louisiana Company, the Colorado Company and the Frisco Company, and over connections governing all shipments inbound or outbound (R. 130);

That with respect to the division of freight rates between the Louisiana & Pacific Railway Company, the Colorado Company and the Frisco Company, the first shall receive 35 per cent of the through rate on all lumber shipments originating on its line with a maximum of 5½¢ per 100 pounds, and the two latter companies agree to publish "the same freight rates from points on the Louisiana Company's line as are or shall be in effect from Eunice, Louisiana, on the Colorado Company's line (R. 130);

On all commodities of traffic other than lumber which may be interchanged between

the Louisiana Company and the Colorado Company and the Frisco Company the said three companies agree to make such divisions of the tariffs between themselves as shall be reasonable and fair, and in accordance with the usual methods of making joint tariffs and divisions on like commodities between railroad companies operating lines of railroad within the State of Louisiana (R. 131).

October 31, 1906, Louisiana & Pacific Railway Company and Lake Charles & Northern Railroad Company (a subsidiary of the Southern Pacific), entered into a contract by which the Lake Charles Company purchased the line of road and right of way of the Louisiana Company between De Ridder and Lake Charles, paying \$15,000 in cash, plus the actual cost of the line between De Ridder and Ramsey. The Lake Charles Company agreed to execute a contract giving the Louisiana Company joint trackage rights over the entire line from De Ridder to Lake Charles, for a period of 20 years, for such trains as the Louisiana Company may desire to operate over said road. The rental was fixed at an amount equal to 25 cents per train mile for every train that shall be run over the road by the Louisiana Company (R. 105). This trackage contract was not formally executed until February 21, 1908, and "was a very good one" for the Louisiana & Pacific, which had "the same rights on the road that we had before and we believed at less money than we could afford to own it and keep it up." (Vol. 1, R. 754.)

The contract for the sale of the road to the Lake Charles Company contained the following clause (R. 108):

This agreement, with all things pertaining thereto, is entered into on the faith of the consummation and performance of a certain agreement of October 31, 1906, between the Louisiana Western Railroad Company, the said Louisiana and Pacific Railway Company, the Hudson River Lumber Company, the King-Ryder Lumber Company, the Calcasieu Long Leaf Lumber Company, and the Long-Bell Lumber Company, for division of freights on joint business and for a routing of a proportion of the products of said lumber companies as provided in said agreement.¹

The contract of sale to Lake Charles & Northern and the contract with Louisiana & Western for through routes and joint rates constituted one transaction (Vol. I, R. 753, 754).

Upon the execution of the contract, the tracks of the lumber companies, which had been conveyed to the Louisiana & Pacific, were connected with the tracks of the trunk lines by trackage rights over the Lake Charles & Northern. The commission gave a full description of the tracks (R. 25).

October 31, 1906, the six companies entered into a contract with the Louisiana Western Railroad Company (a subsidiary of the Southern Pacific), agreeing to ship over the Louisiana & Pacific to the connection with the Louisiana Western at Lake

¹ The contracts of October 13 and 31, 1906 (R. 69, 105), though different in certain provisions, represent the same transactions.

Charles at least 40 per cent of the aggregate products of all their mills. The Louisiana & Pacific was to receive 4 cents per 100 pounds on the products from the mills along its line shipped under the terms of the agreement. As to other freight for the public they agreed (R. 67):

And that upon all other commodities shipped over the lines of said party of the first part and the said party of the second part, the said party of the second part shall be entitled to such per cent of the whole amount of freight received from the entire shipment as may be agreed upon from time to time by the traffic managers of the said first and second parties.

The entire equipment consists of 22 locomotives, 6 cabooses, 41 freight cars and 270 logging cars (R. 26). The petition alleges it as much less (R. 4).

March 2, 1908, the officers of the Louisiana & Pacific made a contract with themselves as officers of the lumber companies in which they agree to furnish the lumber companies all steel rails of suitable class necessary to make any extensions to any of the spurs of the Louisiana & Pacific. December 13 and 14, 1910, the testimony was taken by the Commission at New Orleans, and the contract was before the Commission. March 1, 1911, while the Commission had the case under advisement, the officers of the lumber companies made another contract with themselves as officers of the Louisiana & Pacific by which they agreed to cancel the contract of March 2, 1908, because "the Interstate Commerce

Commission appeared to look with some disapproval upon the furnishing of such equipment by a railway company to a shipper." May 14, 1912, the Commission filed its report. The appellees now allege that "the statement 'the steel for these tracks is furnished and supplied by the tap line without charge' is *incorrect and untrue*" (R. 115, 124, 140, 147, 54).

It also owns a private car, which its officers, who are also officers and stockholders of the lumber companies, use in traveling around the country on free transportation furnished by the trunk lines.

The lumber companies have many miles of unincorporated logging track connecting with the several sections of the Louisiana & Pacific at various points. The logs are loaded by the lumber company and switched by them over the spurs to the point of connection with the incorporated tracks. The cars are then hauled by the Louisiana & Pacific to the mill, about 30 miles distance on the average. *No charge is made by the Louisiana & Pacific against the lumber companies for the log movement.* After the lumber is sawed, the Louisiana & Pacific switches the carloads from the mill at Lake Charles to the Southern Pacific, three-fourths of a mile, or from De Ridder to the trunk lines, a few hundred feet. It moves lumber from the mill at Lake Charles to the Frisco, a distance of 18 miles, and from Bon Ami to the Southern Pacific, a distance of 40 miles. The average haul of the Louisiana & Pacific on lumber movements of the affiliated companies is said to be nearly 20 miles (R. 26).

Cars from any of the mills at De Ridder, Bon Ami, and Longville may be switched to Lake Charles for delivery to the trunk lines. Cars from the mill at Lake Charles may be switched to Fulton or De Ridder and there delivered to the trunk lines. In that way the parties may increase the average lumber haul on the tap line.

The lumber companies ship more than 1,000 cars of lumber per month (R. 59). For the fiscal year 1910, the total movement of lumber was 243,122 tons, and other freight 8,819 tons; *98 per cent of the entire tonnage was supplied by the controlling interests.* The passenger receipts were \$473.77 (R. 26).

For the year ending June 30, 1910, the annual report shows an operating revenue of \$220,985.94, operating expenses \$145,433.69, accumulated surplus \$73,581.07 (R. 27).

WOODWORTH & LOUISIANA CENTRAL RAILWAY
COMPANY.¹

Rapides Lumber Company is a Louisiana corporation, owning about 42,000 acres in Louisiana, from which it cuts timber and manufactures it into lumber at its mills located at Woodworth, with a capacity of 2,100 cars per annum (R. 31). The Long-Bell Lumber Company acts as its selling agent also (R. 3).

¹ The evidence before the Commission is found in Volume I, pages 787-804. The findings of the Commission are at 23 I. C. C. 327. Opinions, Orders, etc., 51. R. 12.

Woodworth & Louisiana Central Railway Company has an authorized capital stock of \$25,000 (Vol. I, R. 789), and is indebted to the Rapides Lumber Company in the sum of \$88,000 (Vol. I, R. 789). It owes \$10,000 to a bank in Alexandria, La., which is secured by a note indorsed by R. A. Long (Vol. I, R. 789, 790). It has no bonds (Vol. I, R. 789). R. A. Long is the owner of the majority of the capital stock of the two companies, which belong to the so-called R. A. Long interests (Vol. I, R. 801). Messrs. Long, Sweet, Bannister and Rickey are all officers in both companies (Vol. I, R. 788). R. A. Long is president, and C. B. Sweet is vice-president, of each (Vol. I, R. 788). The stock of the railway company is owned by the stockholders of the lumber company (Vol. I, R. 789). It is practically the same investment (Vol. I, R. 789).

December 8, 1900, the stockholders of Rapides Lumber Company incorporated Woodworth & Louisiana Central Railway Company (R. 29). It then had a connection with St. Louis, Watkins & Gulf (Iron Mountain) (R. 29). The Rock Island went into that country in 1907, and opened for business in 1908 (Vol. I, R. 799). Before 1908, the Texas & Pacific got at least 75 to 80 per cent of the tonnage. The Iron Mountain did not get a great deal (Vol. I, R. 800).

Woodworth & Louisiana Central now connects with the Iron Mountain at Woodworth, and with Texas & Pacific, Southern Pacific, and Rock Island at Lamoria (R. 3).

There are no joint rates except on lumber (R. 13).

The lumber company owns the spurs in the woods, and the railroad company owns the steel (Vol. I, R. 792). The railroad company owns 5 narrow-gauge locomotives, 4 of which it has leased to the lumber company, which uses them on the spurs (Vol. I, R. 794). No compensation is paid or collected for the use of these locomotives, or *for hauling the logs from the interchange tracks in the forest to the mill and dumping them in the pond* (Vol. I, R. 794, 795), but the Woodworth & Louisiana Central gets the outbound tonnage from the lumber company, which is shipped from Woodworth (Vol. I, R. 795).

August 1, 1906 (two years before it opened for business), the Rock Island entered into its contract with Rapides Lumber Company (R. 44) in which it was agreed that—

(a) On all lumber shipments originating on the line of the Woodworth Company, the Woodworth Company shall receive thirty-five (35) per centum of the through rate, with a maximum of five and one-half ($5\frac{1}{2}$) cents per hundred pounds (R. 48).

(b) No per diem charges shall be made by either the Rock Island Company * * * or the Woodworth Company on freight cars delivered by either to the other of said parties, including its own and also foreign cars, during or for the first six (6) days after each delivery (R. 47).

(c) They will publish joint tariffs relating to the joint traffic over their respective lines (R. 47).

(d) They will maintain the same through freight rates as are maintained from other points on the line of the Rock Island Company in Louisiana (R. 48).

(e) On all commodities of traffic, other than lumber, which may be interchanged between the Woodworth and the Rock Island Companies and the Chicago Company, the said companies agree to make such divisions of the tariffs between themselves as shall be reasonable and fair and in accordance with the usual methods of making joint tariffs and divisions on like commodities between railroad companies operating lines of railroad within the State of Louisiana (R. 48).

The answer of the United States alleges that the Southern Pacific has a similar contract for 40 per cent of the traffic (R. 61). This contract is not in the record. R. S. Davis, traffic manager of the appellees, testified:

Commissioner Harlan: Will you answer the question at this point, whether the connection between the Rock Island and the Woodworth & Louisiana Central resulted in an increase of divisions by any line?

Mr. Davis: An increase of one and one-half cents (Vol. I, R. 799).

* * * * *

We give 50 per cent of our business to the Rock Island if they furnish cars, *and of the balance, 40 per cent to the Southern Pacific.*

He further testified that after the Rock Island opened in 1908, they got from 2 cents to 5½ cents

from the Rock Island (Vol. I, R. 799, 800), and 7 cents on the Denver business (Vol. I, R. 800).

As a result of these arrangements, 95 per cent of the whole traffic now goes over the standard track from the Iron Mountain at Woodworth to the other carriers at La Moria (Vol. I, R. 798).

MANSFIELD RAILWAY & TRANSPORTATION COMPANY.¹

Frost-Johnson Lumber Company is a Missouri corporation owning extensive tracts in Louisiana from which it cuts timber and manufactures it into lumber at its mills at Mansfield, La. (R. 5).

It owns about 325,000 acres of land (Vol. III, R. 2061). In one year it shipped 183,000,000 feet of lumber (Vol. III, R. 2061). There are quite a number of large operators down there (Vol. III, R. 2086). It owns all of the timber in certain territories in that country and a majority of the timber between the railroad and the river, sometimes for a distance of 8 or 10 miles (Vol. III, R. 2085).

Mansfield Railway & Transportation Company is a Louisiana corporation empowered to own and operate a railroad. The general office is at Mansfield. It claims to operate a line of railroad from Mansfield to Hunter, a distance of 16 miles (R. 3). It was incorporated in 1881, and was built by the merchants from Mansfield to Mansfield Junction. Four or five years

¹ The evidence before the Commission is in Volume III, pages 2060-2114. The findings of the Commission are at 23 I. C. C. 587. Opinions, orders, etc., 107. R. 11.

ago, E. A. Frost bought for \$12,500 cash (R. 11, Vol. III, R. 2068), the stock and property of the road, including the equipment and roadbed, which then did not go beyond Mansfield Junction. The line from Mansfield to Mansfield Junction is two miles (Vol. III, 2068). The line from Mansfield to Hunter is 14 miles (R. 12).

After purchasing the stock, E. A. Frost extended it out to Hunter, crossing the Texas & Pacific tracks (Vol. III, 2065). The rail is 60, 56, and 52 pounds. It has not a ballasted road (Vol. III, R. 2069). It has 1 locomotive, 1 box car, and 2 passenger cars (R. 3). Its office force consists of 1 man in the main office and another man to handle the local freight in town (Vol. III, R. 2077).

E. A. Frost is president and admits there is but one investment and one interest in the two companies (Vol. III, R. 2064).

The stock of Frost-Johnson Lumber Company is held by different stockholders, and the entire outstanding capital stock of Mansfield Railway & Transportation Company, amounting to \$77,300 (R. 11), is issued in the name of Edwin A. Frost, who holds it in trust for the stockholders of the Frost-Johnson Lumber Company (Vol. III, R. 2064). Mansfield Railway & Transportation Company is indebted to the Frost-Johnson Lumber Company in the sum of \$216,806.97 (R. 11).

Frost-Johnson Lumber Company sold the track to Mansfield Railway & Transportation Company, but

never divested itself of its right to operate its own trains over it at its own expense (Vol. III, R. 2096, 2097, R. 11). An incorporated logging company, which cuts the trees and brings them to the mill pond, separately operates the logging equipment of the lumber company (Vol. III, R. 2094, 2095). The logging company runs the cars over the tracks of the lumber company by virtue of the right which the latter reserved in its contract with the railroad company to which it sold the track.

The distance from the planing mill to the junction of the main line of the Mansfield Railway & Transportation Company is about 2,000 feet (Vol. III, R. 2072). The distance to the point where cars are delivered to the Kansas City Southern is about three-quarters of a mile (Vol. III, R. 2073).

After the logs are hauled from the forest to the mill by the logging company they are sawed into lumber. The loaded cars are then switched to the connections with Kansas City Southern and Texas & Pacific. The railroad company performs no service whatever on the log haul. One passenger engine performs all of the service. No trackage charge is paid to the railroad (Vol. III, R. 2082).

Nor does the railroad company perform any service whatever as a carrier for other people who have logs to ship (Vol. III, R. 2084, 2085). By reason of contracts between the railroad company and the lumber company, no one can haul a log from Hunter over the line of the railroad company except under condi-

tions dictated by the lumber company. The latter absolutely controls the movement of logs over that line in that direction (Vol. III, R. 2086, 2087).

The average car contains about 19,000 feet of lumber and holds about 60,000 pounds (Vol. III, R. 2093). The lumber rates apply from points on the line of the railroad company (Vol. III, R. 2076).

The divisions are from 1 cent to 4 cents (Vol. III, R. 2075). The railroad company receives the same divisions regardless of the service (Vol. III, R. 2076, 2077). The lumber company does the work and the allowance of 4 cents is paid to the railroad company (Vol. III, R. 2095). There are no earnings until the cars containing the manufactured products are handled (Vol. III, R. 2095). In paying the railroad company for the haul of the logs by the lumber company some profit is yielded on the investment (Vol. III, R. 2076).

After the divisions were agreed upon with the trunk lines, there was delay in arriving at a settlement. The divisions were finally made retroactive, and \$9,500 was paid in a lump sum (Vol. III, R. 2091, 2092).

Much of the inbound tonnage is for the lumber company and the railroad company (Vol. III, R. 2077, 2078). They use more than one-half of the coal. A very large portion of the general merchandise tonnage moves only between Mansfield and Mansfield Junction (Vol. III, R. 2079, 2080).

During the fiscal year ending June 30, 1910, 28,596 tons of lumber were handled, of which 91.4

per cent was supplied by the Frost-Johnson Lumber Company. There were 16,539 tons of miscellaneous freight, almost all of which moved over the line between Mansfield and Mansfield Junction, and a considerable portion of which was handled for the controlling interests or their employees (R. 12, 13).

Edwin A. Frost had one or two passes over the Texas & Pacific and the Kansas City Southern, and occasionally had been to Chicago on transportation (Vol. III, R. 2089). E. T. Whited, vice-president, had one or two passes. He is vice-president of the lumber company and the railroad company (Vol. III, R. 2089).

Commissioner HARLAN. You are both engaged in pushing the interests of the lumber company as far as you can?

Mr. FROST. We push it all we can.

Commissioner HARLAN. And in pushing it you occasionally travel?

Mr. FROST. We have to.

Commissioner HARLAN. And having to travel, you occasionally use free transportation?

Mr. FROST. If we have got it, we do.

Mr. WALTER. You do not understand that under the statute the law prescribes what the purpose of your travel shall be when you ride on transportation?

Mr. FROST. No. (Vol. III, 2089.)

Edwin A. Frost also held passes for the year 1910 over the lines of the Texas & Pacific, Kansas City Southern, Iron Mountain, Cotton Belt, Missouri

Pacific, Wabash, Chicago & Alton, and Chicago & Northwestern. These passes were used regardless of the business on which he traveled (Vol. III, R. 2103, 2104). E. T. Whited had passes in the same way. He looked after the manufacturing and the small railroads (Vol. III, R. 2104, 2105).

VICTORIA, FISHER & WESTERN RAILROAD COMPANY.¹

Louisiana Long Leaf Lumber Company is a corporation, organized for the purpose of manufacturing and selling lumber, with its mills located at Victoria and Fisher, La. It ships annually about 40,000,000 feet, or 2,000 carloads (R. 4, 5). It has approximately 95,000 acres of timberlands (R. 12).

Victoria, Fisher & Western Railroad Company is a corporation, organized under the laws of the State of Louisiana for the purpose of constructing, operating, and maintaining a standard-gauge railroad, from the city of Natchitoches, to East Pendleton (R. 1, 2), through the towns of Victoria and Fisher, where the two lumber mills are located. It has a total capitalization of \$300,000, which represents "a dividend on the capital stock of the Louisiana Long Leaf Lumber Company paid to its stockholders (Vol. II, R. 1577)." It does not appear that any cash passed between the lumber company and the railroad company, when the latter took over the tracks and equipment.

¹ The evidence before the Commission is found in Volume II, pages 1566-1582. The findings of the Commission are at 23-I. C. C. 902. Opinions, orders, etc., 122. R. 10.

It carries only freight and is not incorporated as a passenger line (Vol. II, R. 1570). It has 31 miles main line and 25 miles used in sidings and logging spurs, all standard gauge, with 40 to 60 pound rails (Vol. II, R. 1567). Originally this railroad was largely a logging proposition in connection with one of these mills (Vol. II, R. 1570). It has 5 wood-burning locomotives (Vol. II, R. 1573), 3 box cars, 1 flat car, 105 logging cars, and 4 caboose cars, which it purchased from the lumber company eight years ago (Vol. II, R. 1567, 1568).

The railroad connects with the Texas & Pacific at Victoria and with the Kansas City Southern at Fisher (Vol. II, R. 1567). The distance from the mill at Victoria to the junction with the Texas & Pacific is about 100 yards; and a quarter of a mile in the direction that the lumber moves (Vol. II, R. 1569). The distance from the mills at Fisher to the junction with the Kansas City Southern is very nearly a mile (Vol. II, R. 1569).

Its engines do not go off its own line (Vol. II, R. 1570). It has no station buildings (Vol. II, R. 1570). There are team tracks at the mills and sidings along the main line (Vol. II, R. 1570). From Fisher there are two train crews that make three or four trips daily, and from Victoria there is one that makes two trips daily. The service between Fisher and Victoria is taken care of as required (Vol. II, R. 1571).

The officers and managers of the lumber company and the railroad company are the same (Vol. II, R. 1567), and 99 per cent of the tonnage of the railroad

company is the traffic of the lumber company (R. 12). The stock of the two companies is held by the same stockholders in the same relative proportions. The railroad company pays the lumber company \$1,000 a year, which is the total of the salaries of the officers and clerks of the railroad. W. W. Warren is general manager of both companies and receives a salary from each (Vol. II, R. 1567).

The total tonnage of forest products furnished by the lumber company was 315,496 tons; revenue, \$116,373.90. The tonnage of other freight handled for the lumber company was 245 tons, revenue, \$1,972.96. The forest products handled for others was 920 tons, revenue, \$890.49; other freight, 15 tons, revenue, \$44.87 (Vol. II, R. 1571). The railroad company has never paid any dividend (Vol. II, R. 1577). On June 30, 1910, it had a surplus of \$13,509.17, which it had accumulated since 1902. The road makes \$10,000 a year. Last year the net earnings were \$66,374.79, from which must be deducted \$47,655.88, which represents the abandoned spurs and depreciation on rolling stock and other property. The abandoned spurs all belong to the lumber company (Vol. II, R. 1578).

The railroad handles the logs to, and the lumber from, the mill (Vol. II, R. 1574, 1579). *The haul from the tree to the mill was never considered a part of the through movement* (Vol. II, R. 1579). The railroad accommodates its patrons by building temporary spur tracks off in the woods to get the timber (Vol. II, R. 1579, 1580). All of the tracks belong to

the railroad company and the engine goes the whole way from the tree to the mill (Vol. II, R. 1579).

When the lumber has been manufactured it is loaded into empty cars that are supplied by the Texas & Pacific and the Kansas City Southern, who furnish the equipment (Vol. II, R. 1574). The Victoria, Fisher & Western sets the cars at the mill. They are then loaded by the mill employees, switched by the Victoria, Fisher & Western, or moved by it, over to the trunk lines (Vol. II, R. 1574). The length of the movement at Victoria over tracks of the railroad company from the mill to the Texas & Pacific is 100 yards (Vol. II, R. 1569). From Fisher to the interchange track of the Kansas City Southern is about 1 mile (Vol. II, R. 1569).

The Victoria, Fisher & Western Railroad Company participates in, and receives divisions out of, the joint rates with the Texas & Pacific and the Kansas City Southern roads (Vol. II, R. 1571). On lumber the railroad company receives from $\frac{3}{4}$ of a cent to 4 cents (Vol. II, R. 1573). The highest divisions are from the Kansas City Southern on their traffic to Kansas City, which is a 4-cent division (Vol. II, R. 1573). The rates are on a milling in transit basis and cover the movement of the logs into the mill and the subsequent movement of the lumber out (Vol. II, R. 1572). The service rendered for the division is the milling in transit service, placing and switching of empty and loaded cars, and weighing of loads and delivery to the mill (Vol. II, R. 1574). For moving over the branch lines the railroad company charges \$1.50 per 1,000 feet (Vol. II, R. 1572).

The Victoria, Fisher & Western Railroad Company does not issue any waybills, but simply switches the car over to the Texas & Pacific. The Kansas City Southern executes the bills of lading on lumber originating at Fisher and moving over its line. "Cane" is the junction of all the logging spurs west of Fisher (Vol. II, R. 1575). The Louisiana Long Leaf Lumber Company writes the bill of lading, shows the point of origin as Cane, and delivers that shipment and the bill of lading to the Kansas City Southern. Cane is not on the Victoria, Fisher & Western, and a bill of lading which recites that the property was received at Cane *is a little mixed* (Vol. II, R. 1576). The bill of lading provides that the property is received at Fisher and originated at Cane.

Some lumber moves from the Fisher mill over the main line to the Texas & Pacific, and some moves in the opposite direction from the Victoria mill over the main line to the Kansas City Southern. The division is the same regardless of the service performed (Vol. II, R. 1576).

There is a small mill between Fisher and Victoria, which brings its logs to the mill by team. The lumber company hauls its logs by teams to the spurs (Vol. II, R. 1580). No shipper has ever asked to see the tariffs of the Victoria, Fisher & Western Railroad Company (Vol. II, R. 1577). The railroad company keeps its accounts in accordance with the rules prescribed by the Commission and in other respects complies with the statute (Vol. II, R. 1577).

BUTLER COUNTY RAILROAD COMPANY.¹

American Sugar Refining Company is engaged in refining and marketing sugar. It has important refining establishments at New York City and New Orleans (R. 64). In connection with, and as a part of, its business it controls extensive timber tracts and lumber industries in Butler County, Missouri, from which it secures staves, barrel heads, and lumber products, for its two manufacturing establishments (R. 41). Its operations in Butler County are conducted by its subsidiary corporations.

Great Western Land Company is a corporation holding the title to large tracts of lands in Butler County, Missouri (R. 15), producing hardwood timber, consisting principally of gum, oak, hickory, ash and elm (R. 16). Its entire capital stock is owned by American Sugar Refining Company (R. 16).

Brooklyn Cooperage Company is a corporation owning and operating a lumber mill at Poplar Bluff, Butler County, Missouri. Prior to 1905 it owned 12 miles of railroad track, which it used in connection with its lumbering and milling business. It cuts lumber from the lands of the Great Western Land Company (R. 20), and manufactures it into staves, barrel heads, and other lumber products (R. 41), which are consumed "by the real owner" (R. 34), and are shipped principally to New York and New Orleans "because the owner of the mill, or the practical owner, consumes

¹ The evidence before the Commission is all in the short record. The findings of the Commission are at 23 I. C. C. 628. Opinions, orders, etc., 148. R. 62.

the cooperage at the sugar plants in the vicinity of those two places" (R. 48). Its principal business is the manufacturing of sugar barrels with which to ship the sugar refined by the American Sugar Refining Company, which owns the whole of its capital stock (R. 16).

Butler County Railroad Company was organized in 1905, under the railroad statute of Missouri (R. 11). It operates 34 miles of railroad track, of which it owns 12 miles (R. 14), which it acquired at the time it was organized from Brooklyn Cooperage Company (R. 14). Its entire equipment consists of 2 locomotives, 2 passenger coaches, 3 cabooses, and about 100 freight and logging cars (R. 63). It has an authorized capital stock of \$200,000, of which \$163,500 has been issued (R. 15) and is now held by certain individuals in trust for Brooklyn Cooperage Company (R. 14). Part of the stock was issued in consideration of the tracks, which the Cooperage Company turned over to it. It has a bonded indebtedness of \$50,000. The note and the mortgage securing the note are made payable to the Brooklyn Cooperage Company (R. 15).

The patchwork railroad system of Butler County Railroad Company may be thus described:

The tracks consist of two disconnected sections. One section connects with the Iron Mountain and the Frisco at a point at or near Poplar Bluff, known as Linstead, and extends to and into the plant of the Brooklyn Cooperage Company, which is within three-fourths of a mile of the two trunk lines (R. 62). The other, or principal, section connects with the Iron

Mountain at Lowell Junction, about $7\frac{1}{2}$ miles east of Poplar Bluff, and extends southward for a distance of 7 miles to a point called Bailey's. At Rossville a stem projects westward and southward for 3 miles. These are the only tracks which it owns.

From Poplar Bluff to Lowell Junction the track is owned by the Iron Mountain, over which, through an oral arrangement, the appellee operates such equipment as it has. In order to make this patchwork of any use whatever, the Butler County Railroad Company enjoys the high privilege of running its equipment over the rails of the Iron Mountain for the small consideration of 65 cents a train mile for 25 cars, 75 cents a train mile for 35 cars, and 85 cents a train mile for 45 cars (R. 13) amounting to \$3,600 (R. 13) for 10,436 cars for 1910 (R. 29). From Bailey's to Melville, and from Melville to Menorkenut, the track is owned by the Brooklyn Cooperage Company. North and east of Menorkenut the Brooklyn Cooperage Company is lumbering on the lands of the Great Western Land Company (R. 20). The stem from Melville south projects about $2\frac{1}{2}$ miles into the forest where the Brooklyn Cooperage Company is also lumbering (R. 18) on the lands of Great Western Land Company.

The appellee performs no service on the tracks in bringing the traffic to the line operated by it, which is performed by the engine of the Brooklyn Cooperage Company (R. 23). Butler County Railroad Company transports the timber from the point where it is tendered to it to the mill (R. 22).

South of Melville, and north of Menorkenut, the Brooklyn Cooperage Company operates logging roads in the forests of the Great Western Land Company. The locomotives of the Cooperage Company are confined to the logging roads (R. 19). They haul the timber from the forest over the logging tracks to the switch at an interchange point, where Butler County Railroad Company receives it (R. 20).

A charge of 1 cent to $1\frac{1}{2}$ cents per 100 pounds, amounting approximately to \$4 per car, is made by the Butler County Railroad Company against the Brooklyn Cooperage Company for the log movement to the mill. Butler County Railroad Company switches the loaded cars from the mill to the tracks of the Frisco or Iron Mountain, a distance in each case of less than 1 mile. It receives from the trunk lines an allowance of from 2 to 5 cents per 100 pounds (R. 63), amounting in some instances (to Cairo, for example), fully to one-half of the through rate (R. 42, 43).

For the fiscal year ending June 30, 1910, the traffic of Butler County Railroad Company consisted chiefly of forest products, amounting in the aggregate to 184,688 tons, as against 2,475 tons of other freight. Of the first figure, 107,527 tons were logs and cooperage furnished by the controlling interests; 77,161 tons of logs, bolts, piles, ties, and lumber were moved for outsiders, but all of the timber came from lands of the Great Western Land Company. The 2,475 tons of miscellaneous freight included 1,195 tons of inbound machinery and coal for the proprietary companies (R. 63).

For the benefit and advantage of the American Sugar Refining Company the rate from Poplar Bluff to New York and New Orleans on cooperage material is 2 cents less than the rate from all other points on the line of Butler County Railroad Company. The few independent shippers must pay either the local rate in addition to the charge of the trunk line, or a through rate that is 2 cents higher than the rate from Poplar Bluff (R. 62, 64).

Fifty-seven per cent of the entire tonnage was handled for the Brooklyn Cooperage Company, 42 per cent was other carload freight, and 1 per cent was less than carload. Thirty-nine per cent of the revenue was derived from the carload freight handled for the Brooklyn Cooperage Company, or \$28,092; 55 per cent for other carload freight, or \$41,133; and 6 per cent for less than carload freight, or \$4,427 (R. 31, 32).

SPECIFICATIONS OF ERROR.

In No. 829 the assignments of error appear on pages 157-160, inclusive. In No. 831 the assignments of error appear on pages 92-95, inclusive. In No. 833 the assignments of error appear on pages 99-101, inclusive. In No. 835 the assignments of error appear on pages 62-65, inclusive. In No. 837 the assignments of error appear on pages 107-109, inclusive.

No purpose would be subserved by repeating them. That the Commerce Court was without jurisdiction to entertain the petitions, and that it erred in

annulling in whole or in part the order of the Interstate Commerce Commission are the two main contentions of the Government.

BRIEF OF ARGUMENT.

I. The Commerce Court was without jurisdiction to hear and determine the cases.

1. The portion of the Commission's order of which appellees complain was merely a refusal of the relief for which they prayed and was negative in character.

II. The Commerce Court properly disregarded the testimony taken before it on behalf of the appellees.

1. The findings of the Commission if based on substantial evidence are conclusive.

2. Congress, therefore, did not contemplate a retrial of the issues of fact before another tribunal.

III. The incorporation of the tap lines was insufficient to confer on them the status of common carriers or to alter their relations to, or the character of the services performed by them for, their proprietary companies.

1. Under the Interstate Commerce Act an individual as well as a corporation may be an interstate common carrier.

2. The court will look behind the fact of separate incorporation to ascertain the actual relations of the parties.

IV. The conclusions reached by the Commission did not proceed upon arbitrary or unlawful distinctions and are supported by the evidence.

1. That certain of the tap lines before it were not *bona fide* common carriers as to the proprietary traffic but mere plant facilities, and were therefore not entitled to a division out of the through rate.

(a) Only common carriers are entitled to divisions out of joint rates.

(b) Appellees' ostensible holding out, or the trifling incidental service performed by them for third persons, were not sufficient to make them common carriers as matter of law.

(c) Nor would this holding out and this incidental public service render their services to their proprietary companies other than those of plant facilities.

(d) The facts in evidence warranted both conclusions.

2. That the switching service within three miles of the trunk line, being one which the trunk line held itself out to perform under the through rate, was a service "connected with transportation" when performed by the shipper or its agent; but that switching for a greater distance so performed was purely an accessorial service.

3. Hence, that a plant facility tap line performing this service within the three-mile limit was entitled to an allowance under §15, but to no division out of the through rate.

4. That a common carrier tap line was entitled to a division or allowance out of the through rate on a haul of either more or less than three miles.

5. That the movement of the logs to the mill was not a transportation service to be paid for out of the through rate but an accessorial service for which the shipper should pay.

6. That any allowance for switching within 1,000 feet of a trunk line was "a mere device to effect an unlawful payment."

V. Assuming that the Commerce Court correctly interpreted the Commission's findings and order, the latter were not without support in the evidence nor erroneous in law.

VI. These conclusions of the Commission are conclusions of fact and are therefore not open to judicial review.

1. Questions of discrimination, preference, divisions and allowances are questions of fact peculiarly within the competency of the Commission.

2. An inference drawn by the Commission even from undisputed testimony is conclusive upon the courts unless erroneous as matter of law.

ARGUMENT.

I.

The Commerce Court was without jurisdiction to hear and determine the cases.

1. That portion of the Commission's order of which appellees complain was merely a refusal of the relief for which they prayed and was therefore negative in character.

The second order was as to them no more affirmative in character than the first.

As has been stated, the Commission entered two orders, one on the 14th day of May, 1912, and the other on the 30th day of October. Confessedly, the second order was entered at the instance of these appellees to give color of jurisdiction to the Commerce Court. We submit that so far as the appellees are concerned the two orders are identical in effect and amounted simply to refusing in whole as to four of the appellees and in part as to the fifth, Butler County Railroad Company, the relief for which they had severally petitioned the Commission.

It will be recalled that the controversy began with the cancellation by the trunk lines of the joint rates theretofore in force between themselves and these several tap lines on forest products, and it was this cancellation which brought the appellees to the Commission for relief. Their attitude before that body may be stated in their own language, borrowed from their several petitions to the Commerce Court.

The Mansfield Railway & Transportation Company
(No. 833, R. 9)—

filed with the Interstate Commerce Commission its petition against the Kansas City Southern Railway Company and its separate petition against the Texas & Pacific Railway Company, complaining of the cancellation by said defendants of joint rates theretofore in effect upon forest products, particularly lumber, requesting of the Commission that an answer be required from each of these defendants, that an investigation be entered into and that joint rates be compelled by and between the said defendants, Texas & Pacific Railway Company and Kansas City Southern Railway Company with the petitioner, Mansfield Railway & Transportation Company, and their connections to all interstate destinations upon all forest products originating at points upon lines of the petitioner, Mansfield Railway & Transportation Company.

The Louisiana & Pacific Railway Company, the Woodworth & Louisiana Central Railway Company, and the Victoria, Fisher & Western Railroad Company filed no formal petitions, but (No. 829, R. 21)—

At the beginning of said hearing at New Orleans on December 8, 1910, the Honorable James S. Harlan, the Commissioner presiding at said hearing, made the announcement to the parties interested and appearing at said hearing, that each so-called Tap Line would be treated as though it had filed a formal petition.

Thereafter, by leave of the Commission, the Louisiana & Pacific Railway Company filed a brief in which it petitioned the Commission as follows (No. 829, R. 20):

While this Commission has not all the powers of a court of equity, and while we recognize that if the Louisiana & Pacific is not entitled to through routes and joint rates and fair divisions, its contracts will not give it that right, yet with these contracts existing, with the vested rights based thereon and on the previous decisions of this Commission, we respectfully and most earnestly ask that this Commission, under its power to compel the trunk line railroad companies to maintain through routes and joint rates, issue an order to those trunk line roads to continue the through routes and joint rates heretofore existing with the Louisiana & Pacific.

The Woodworth & Louisiana Central Railway Company filed a similar brief in which it "petitioned the Interstate Commerce Commission to make an order compelling the trunk line railroad companies to restore the rates existing with the petitioner Woodworth & Louisiana Central Railway Company" (No. 831, R. 8).

The Victoria, Fisher & Western Railroad Company filed a similar brief (No. 835, R. 9).

The Butler County Railroad Company filed three complaints before the Commission against the Missouri Pacific Railway Company, the St. Louis & San

Francisco Railroad Company, and the Alabama & Vicksburg Railway Company, respectively, in which

petitioner prayed that the Commission might suspend the operation of certain tariffs and notices which were filed by the defendants in the three proceedings above mentioned, cancelling the joint tariffs then in effect with petitioner, on lumber and forest products, which had been filed and established by the defendants above mentioned; and also praying that the Commission might find that the through routes and joint rates, and the divisions thereof then in effect, were just, fair, and reasonable, and might require the observance thereof by proper order (No. 837, R. 3).

As to the first four appellees the original order held that their service to their proprietary companies in moving logs and lumber was not a service of transportation, that allowances or divisions upon it were unlawful, and their petitions were dismissed. The Commission, in brief, declined to grant as to this proprietary traffic any part of the relief for which they had prayed.

The orders of cancellation which the trunk lines had entered stood, and the original joint rates having been declared unlawful it was out of the question, of course, that the trunk lines should restore them.

The effect of the second or amended order is identical so far as these four appellees are concerned. It is true, the Commission adds to its finding that these appellees are "plant facilities," but this, of course, is to be implied from the original order declaring that

the service rendered for their proprietary companies is not a service of transportation. The amended order also adds a section directing the principal defendants, trunk lines, to abstain from making any of the allowances which the Commission had declared unlawful and which the trunk lines had already abandoned. While this was a modification in form, we submit that it was no change in legal effect or consequence. The result of both orders to these four appellees is that they were denied the relief for which they had petitioned, the cancellations which the railroads had made on proprietary traffic were permitted to stand, and the Commission refused to disturb the *status quo*.

Thereupon, the identical petitioners who originally invoked the jurisdiction of the Commission, and tried their cases before it, filed their several petitions in the Commerce Court, not for the purpose of annulling and enjoining an order of the Interstate Commerce Commission entered against them, but for the sole purpose of transferring their lost case before the Commission to the court to make another attempt to gain that which had been denied them. The respective prayers of the several petitions allow them no escape from this position. The prayer in the Louisiana & Pacific case, which will serve as an illustration, is as follows (No. 829, R. 63):

Wherefore, petitioners, and each of them, pray that the said orders of the Interstate Commission dated May 14, 1912, and October 30, 1912, be enjoined, set aside and

annulled; that the United States of America, the Interstate Commerce Commission and all persons claiming to act under their authority, direction or control, be enjoined and restrained from enforcing or attempting in any wise to enforce or put in effect any portion of said orders which require the respondent Railway Companies to cease and for a period of two years thereafter abstain from maintaining through routes and joint rates upon any property transported from the mills of the petitioners Lumber Companies on the line of the Louisiana & Pacific Railway Company.

And your petitioners further pray that the respondents, Railroad Companies, be enjoined and restrained from violating the terms of the said contracts herein pleaded and herein fully set out under the marks of Exhibits "A" and "B," and that they and each of them be specifically ordered and required to continue to observe the terms, conditions and obligations of said contracts, by filing with the Interstate Commerce Commission the tariffs described and set out in paragraph 12 hereof (or similar tariffs), giving to the Louisiana & Pacific Railway Company through interstate rates, and that the Interstate Commerce Commission be specifically ordered and commanded to accept, receive and file and to permit to become effective upon three days' notice the tariffs specifically described in paragraph 12 hereof, or similar tariffs.

Under the act the Commerce Court is not given jurisdiction to redress complaints based exclusively, as in these cases, on the ground that the Commission

has refused the relief asked. *Proctor & Gamble v. United States*, 225 U. S. 282.

Nor is the Butler County Railroad Company in any better position. Like its companions, it prayed that the Commission would suspend the cancellations made by the trunk lines and that it would reaffirm the existing through routes and joint rates. The prayer of this petition was granted in part. It was refused as to so much of the preexisting divisions and allowances as exceeded the rate of \$1.50 per car moving from the proprietary mill to the trunk lines. The complaint of the petitioner and appellee goes to this refusal. It prays that the court will (No. 837, R. 7)—

First. Grant a preliminary writ of injunction suspending the order and amended order of the Commission, in so far only as it forbids a division out of the joint rates to be reestablished on January 1, 1913, to petitioner greater than \$1.50 per car, but that the division of said joint rates to be reestablished as aforesaid may continue as heretofore agreed upon by petitioner and its connections aforesaid, and that this preliminary writ of injunction may continue, pending the final hearing and determination of this suit.

Second. That it be adjudged, ordered, and decreed that the order of the Commission and the amended order aforesaid, in so far as they forbid a division out of said joint rates to petitioner greater than \$1.50 per car, as aforesaid, be forever enjoined, set aside, annulled, and suspended, and that the said United States of America and the Commission and

their representatives, officers, agents, and servants be forever enjoined from enforcing or taking any steps to enforce the order or amended order aforesaid, in so far as it limits the division of said joint rates to which petitioner is entitled to \$1.50 per car aforesaid.

As to the matters of which it complains, the order of the Commission was purely negative also, and its case is therefore governed by *Hooker v. Knapp*, 225 U. S. 302, in which the complainant had received before the Commission part but not all of the relief desired.

If for the purpose of the argument it is assumed that the tap-line appellees are common carriers of the traffic of the lumber companies, the court is still without jurisdiction.

If appellees are unsuccessful before the Commission in seeking to have established through routes and joint rates with other common carriers and do not secure such liberal divisions as they seek for the traffic which they control, certainly Congress did not contemplate that they may transfer their cases to the Commerce Court. The Act to Regulate Commerce, after providing that the Commission may direct the carriers to establish through routes and joint rates, provides that—

Whenever the carrier or carriers * * * shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and

reasonable proportion of such joint rate to be received by each carrier party thereto,
* * *. (Sec. 15, 36 Stat. 551.)

Under this section the Commerce Court was still without jurisdiction, as the Commission is arbiter of all questions of difference between common carriers in establishing through routes and joint rates. The Congress did not contemplate that the United States should be made the principal litigant representing the public interest in a case which involves merely the private divisions of two common carriers in establishing through routes and joint rates. *United States v. Pacific & Arctic Co.*, 228 U. S. 87.

II.

The Commerce Court properly disregarded the testimony taken before it on behalf of the appellees.

1. The findings of the Commission if based on substantial evidence are conclusive.

This proposition is now too firmly established to require more than a reference to recent cases which have placed it beyond dispute.

Interstate Commerce Commission v. Union Pacific Railroad Co., 222 U. S. 541, 548, 550.

Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U. S. 88.

The necessary outcome of this doctrine is that the courts in reviewing an order of the Commission are virtually confined to the consideration of questions of law. This is recognized in *Procter & Gamble Co.*

v. *United States*, 225 U. S. 282, 297, where it is said:

Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452.

Commenting on the decision in the *Procter & Gamble* case this court, in *United States v. Balt. & Ohio R. R. Co.*, 225 U. S. 306, 323, said:

And as, at that time it was conclusively settled that the courts had only authority to reexamine the findings of the Commission as to subjects like the one here under consideration, for the purpose of ascertaining whether the action of the Commission was repugnant to the Constitution, in excess of the statutory powers conferred upon it, or manifested such an abuse as to be equivalent to an excess of authority, it clearly results that the court be-

low was likewise limited in passing upon the petition before it in this case. This being true, *it is also necessarily true that virtually the sole authority of the court below was in a sense confined to determining questions of law arising upon the case as presented on the face of the pleadings.* (Italics ours.)

2. Congress, therefore, did not contemplate a retrial of the issues of fact before another tribunal.

The respective appellees in their several petitions have alleged much matter new and different from that which they adduced before the Commission. Among other things, they have sought substantially to swell the volume of the tonnage handled for others than the proprietary companies and to show other things relating to the operation of the tap lines which have been created since the hearing before the Commission. The appellees took additional evidence before the Commerce Court, which was later stricken out, and no cross error was assigned.

The only inquiry open to the court upon an issue of fact is whether or not there was substantial evidence to support the Commission's finding; if there was such evidence, the court can not reverse that finding simply because it would have come to a different conclusion upon all the facts. Obviously, however, this inquiry can not be affected by any evidence which was not introduced before the Commission.

The Commerce Court was therefore entirely correct in recognizing as it did this limitation upon its powers.

III.

The incorporation of the tap lines was insufficient to confer on them the status of common carriers or to alter their relations to, or the character of the services performed by them for their proprietary companies.

1. Under the Interstate Commerce Act an individual as well as a corporation may be an interstate common carrier.

The circumstance that the Act to Regulate Commerce applies in terms to any person or corporation engaged in the transportation of passengers or property by rail from one State to another was referred to, as we have seen, by the Commission itself. (23 I. C. C. 291.) It seems quite clear, therefore, that the Commission was entirely correct in disregarding the fact of incorporation in its attempt to ascertain whether or not the tap lines before it were interstate common carriers. For whatever the provisions of the State law on the subject, the status of a tap line in interstate commerce must depend on the character of the services performed and not at all on the circumstance of its existence as a distinct corporate entity.

In the present cases the Commission find (23 I. C. C. 277, 286):

* * * In most instances the tap line was incorporated for no other purpose than to give the lumber company the color of a legal right to receive allowances. Witness after witness, as heretofore stated, broadly and definitely admitted at the hearing that the sole object

in incorporating his tap line was to obtain and legalize the allowances.

* * * * *

The record is filled with similar admissions by other witnesses representing other tap lines. Counsel for one trunk line in order, as he explained, to get the fact of record, said that his legal department some years ago advised the traffic department that it would be illegal to pay an allowance or a division of any kind to an unincorporated tap line, but that it would be legal to pay a division to an incorporated tap line. Subsequently, his traffic department advised the lumber interests that had been receiving allowances that they would no longer be paid unless their lines were incorporated, and new lines were advised that they had to be incorporated.

2. The court will look behind the fact of separate incorporation to ascertain the actual relations of the parties.

This has been so frequently reiterated by this court under a variety of circumstances, and particularly with regard to the Act to Regulate Commerce, that no extended discussion of the point seems necessary.

Miller & Lux v. East Side Canal Co., 211 U. S. 293.

So. Pac. Terminal Co. v. Int. Com. Comm., 219 U. S. 498, 521.

United States v. Union Stock Yard, 226 U. S. 286, 304.

Fourche River Lumber Co. v. Bryant Lumber Co., 230 U. S. 316.

Crane Iron Works v. United States, 209 Fed. 238.

IV.

The conclusions reached by the Commission did not proceed upon arbitrary or unlawful distinctions and are supported by the evidence.

1. That certain of the tap lines before it were not *bona fide* common carriers as to their proprietary traffic, but mere plant facilities, and were therefore not entitled to a division out of the through rate.

This finding concerns the first four tap lines which are appellees here.

(a) If the Commission was justified in concluding that these tap lines were not *bona fide* common carriers as to their proprietary companies, it seems too plain for argument that they had no claim to a division out of the through rate. For a joint rate, or a division therefrom, is only permissible between public carriers; it would be an anomaly for an individual or company not a common carrier to be permitted to receive such a concession. The inevitable result would be those very discriminations against which the Commerce Act was primarily directed. Indeed, the provision of section 15 allowing the owner of property transported to receive a reasonable allowance for rendering any service connected with such transportation or furnishing any instrumentality used therein, is wholly incompatible with the notion that he or any third person may accept a division out of the rate for such services. Were it otherwise the requirement in section 15 that the "allowance therefor shall be

no more than is just and reasonable" could readily be violated in substance if not in form.

This rule has been uniformly recognized by the courts. Thus, in *Taenzer & Co. v. Chicago, R. I. & P. Ry. Co.* (C. C. A. 6th C.) 191 Fed. 543, the contract between a railroad and a lumber company, whereby the latter was to receive certain divisions out of the through rate for switching over its own private tracks from its mill to the main line, was held to be void and in violation of the act.

Similarly, in *Chicago & Alton Ry. Co. v. United States* (C. C. A. 7th C.), 156 Fed. 558, it was held that the payment of a dollar per car by an interstate carrier to a shipper for the use of the private tracks on its plant in getting cars out to the main line constituted a rebate, since the private tracks in question were mere plant facilities, and hence carriage over them was not part of the interstate transportation. The decision was affirmed by this court without opinion in 212 U. S. 563. The arrangement held unlawful was not filed or published, and that may have been the ground of this court's affirmance. It was expressly not the basis of the judgment of the Circuit Court of Appeals.

In *Central Yellow Pine Association v. Vicksburg, Shreveport & Pacific R. Co.*, 10 I. C. C. 193, the Commission held that an interstate carrier subject to the act can allow a division of rates only to another common carrier which, participating in the particular traffic to which the rate applied, is also subject to its

provisions, and hence that the defendants could not lawfully grant a division of the rate to the owner of a lumber mill as compensation to him for bringing his logs to the mill.

But the correctness of this conclusion is distinctly asserted in *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 316, 322, where the court, in dealing with one of the incorporated tap lines included in the Commission's order, said:

The status of this road is discussed in *Tap Line Cases*, 23 I. C. C. 277, and its right to a division of the freight recognized notwithstanding the fact that the stockholders are the same as those who own the shares of the Fourche Lumber Company. But it receives this part of the through rate, not as a concession, but for services actually rendered by it *as a common carrier* in hauling freight for part of the distance between the point of origin and the point of destination. In any other view it would have been unlawful for the Rock Island to pay * * *. (Italics ours.)

Nor is this conclusion affected by the decision of this court in *United States v. Balt. & Ohio R. R. Co.*, 231 U. S. 274. The terminal company (Arbuckle Bros.) in that case, although expressly found to be performing a public service, was only held to be entitled to a reasonable allowance under section 15; it was not even claimed that a division out of the through rate was payable.

Likewise, *Interstate Commerce Commission v. Diefenbaugh*, 222 U. S. 42, dealt only with allowances under section 15 and not with divisions out of the through rate.

(b) Nor was the mere fact that the appellees performed some service for the general public, or rather for such few members of it as were able to avail themselves of such service, sufficient to necessitate the finding that they were common carriers. A plant railroad does not become a common carrier merely by calling itself such, nor yet by offering to serve the public when there is substantially no public to serve.

The cases arising under State laws which tend to support a different view are not controlling here. It may well be that a railroad which would be a common carrier at common law or under State statutes is not to be regarded as a common carrier "engaged in the transportation of passengers or property" in interstate commerce within the meaning of the first section of the Act. If the Commission is to be held to the strict rule that a holding out to serve the public, regardless of the existence of a public to be served, is sufficient to render an industrial railroad a common carrier engaged in interstate commerce, the prohibitions of the act against unjust discriminations and undue preferences can readily be thwarted. It is hardly conceivable that Congress, in permitting divisions out of joint rates to common carriers jointly engaged in the interstate movement of property

within the discretion of the Commission, contemplated the payment of such divisions to large shippers through the simple expedient of a holding out to serve all alike.

Such was the attitude of the Commission in the *Matter of the Transportation of Salt from Hutchinson*, 10 I. C. C. 1, 9, where it was said of the alleged railroad there under consideration:

It is possible that the institution as now constituted may be technically a railroad under the laws of Kansas; but looking to the substance, and not the form, it is purely a scheme for the purpose of obtaining a concession in the rate.

This principle was asserted even more emphatically by the Commission in *Star Grain & Lumber Co. v. A., T. & S. F. Ry. Co.*, 17 I. C. C. 338, a case involving much the same question as is here presented. After stating that it could not recognize as a common carrier a tap line which did not conform to the requirements of the act with regard to the publishing of tariffs and the keeping of accounts, the Commission continued (p. 344):

But assuming a case where all these matters have been carefully guarded by tariffs properly constructed and a system of accounts conforming to our regulations, must we accept that tap line as a common carrier merely because it calls itself a common carrier, when in fact its so-called line is a mere logging road extending from the mill that really owns it into the forest also owned by the mill, with

no public to serve or no traffic other than the logs that have been cut by the mill and are to be manufactured by it into lumber? In other words, as an administrative body, are we to be stopped at the surface of a transportation problem because its form and outward appearance are regular and not look into and examine its real substance?

It is sometimes said that the essential characteristic of a common carrier is that it holds itself out as such to the world, and in a certain class of cases some such test has been applied; and *where there is a shipping world to which it may hold itself out as a common carrier and which it may serve in that capacity* the test suggested may be a proper one. But when we are dealing with a law the underlying principle of which is to forbid preferences, discriminations, and concessions from the legal rates, and when there is no shipping public which the alleged common carrier may serve, and when it is owned or controlled directly or indirectly by a particular industry which needs it as a plant facility and can not successfully conduct its business without it, and when its revenues accrue directly or indirectly to that industry, it leaves this Commission in rather an impotent condition if it must accept the mere form as controlling, and may not look into the actual situation and thus be able to enforce the prohibitions of the act against such preferences and discriminations and departures from lawfully published rates. (Italics ours.)

The following conclusion was reached (p. 345):

We hold that any allowance or 'division made to or with a tap line that is owned or controlled, directly or indirectly, by the lumber mill or by its officers or proprietors and that has no traffic beyond the logs that it hauls to the mill, *except such as it may pick up as a mere incident to its efforts to serve the mill as an adjunct or plant facility*, is an unlawful departure from the published rates. (Italics ours.)

This ruling was followed in *Fathauer Co. v. St. L., I. M. & S. Ry. Co.*, 18 I. C. C. 517, and *Industrial Lumber Co. v. St. L., W. & G. Ry. Co.*, 19 I. C. C. 50. It is therefore seen that its application to the present controversy involves the enunciation by the Commission of no new doctrine.

The Commerce Court, as has been pointed out, conceded that the Commission would have been justified in finding that the tap lines before it were not *bona fide* common carriers; in other words, that the mere facts of holding out or of *some* service performed for third persons were not determinative of their character. Unless the primary purpose of the Commerce Act is to be defeated by an overstrict construction of its language (a result which this court has always assiduously avoided), this concession must be accepted as sound.

The Commission therefore rightly regarded the question as one of fact, to be determined in each instance by ascertaining the substantial character of

the service performed by the tap line for the public at large as compared with the work done for its proprietary company.

(c) It is not necessary to go this far in order to sustain the action of the Commission. The finding of that body with regard to the tap lines in the first group, as recited in its order, was that—

the tracks and equipment *with respect to the industry of the several proprietary companies* are plant facilities, and that the service performed therewith *for the respective proprietary lumber companies* in moving logs to their respective mills and * * * in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad but is a plant service by a plant facility. (Opinions, 180.)

The Commission, in short, limited its finding to the immediate question before it. If this finding can only be sustained by implying the additional finding that these tap lines were not common carriers at all, this court may properly make that implication on the assumption that the Commission acted lawfully and within its delegated power; and the facts, as will shortly appear, amply warrant that result. But we submit that it is not necessary to go so far; that the Commission's finding as it stands is lawful and adopts a proper distinction; in other words, that a railroad may be a mere plant facility with respect to the service performed by it for its owners, regardless of its status with respect to the public at large.

In *Santa Fe Railway v. Grant Bros.*, 228 U. S. 177, 185, this court said:

It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things whose carriage in other circumstances might be within its public obligation. *Baltimore & Ohio, &c., Railway Co. v. Voigt*, 176 U. S. 498, and cases cited; *Northern Pacific Railway Co. v. Adams*, 192 U. S. 440; *Long v. Lehigh Valley R. R. Co.*, C. C. A., 2d Circuit, 130 Fed. Rep. 870.

In the instant case the Commerce Court said (Opinions, 192, 193, 194):

That a common carrier may, however, as to some of its work, act in a strictly private capacity is well settled (*A., T. & S. F. Ry. v. Grant Brothers*, 228 U. S. 177); and that it may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, has been held by this court in *Crane Iron Works v. U. S.*, No. 55, June 7, 1912.

Whether or not a payment provided for in the tariff for such a service would be per se illegal in the absence of an order by the Commission forbidding it (*C. & A. Ry. v. U. S.*, 156 Fed. 558; *Am. S. R. Co. v. D., L. & W. Ry.*, 207 Fed. 733, reversing s. c. 200 Fed. 652), it is clearly within the power of the Commission to prohibit such payment (*Am. S. R. Co. v. D., L. & W. Ry.*, *supra*).

If, then, the Commission was justified in finding that these interstate common carriers, the petitioning tap lines, were mere plant facilities as to their proprietary companies, and that the services rendered by them in hauling logs to and lumber from the proprietary mills were merely the plant services of plant facilities, its order forbidding any division or allowance therefor would be valid and proper.

Whether or not this is a justifiable finding of fact is to be determined, in the first instance, by the Interstate Commerce Commission. When, as in these cases, a full and fair hearing has been granted, the Commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the record before it or are arbitrary in being based upon improper distinctions and considerations.

No constitutional question can properly be involved in such a case, inasmuch as the tap lines, if they are in fact acting only as plant facilities in respect to the proprietary companies, can have no constitutional right to that which is necessarily an illegal allowance, however much they may be injured financially by the denial thereof.

Nor can the Commission be charged with such arbitrary action as would justify an annulment of its orders in respect to the petitioning tap lines merely because of a different finding as to some other tap lines, whose history, physical conditions, and relations to and

service for the proprietary companies are in many respects like, although necessarily not identical with, those of the petitioning tap lines and their proprietary companies; for though the orders are made in one proceeding, they are separate and distinct as to each of the tap lines, and are expressly based upon a careful investigation of and separate findings in relation to each of the companies. Moreover, an erroneous conclusion by the Commission as to the real nature of the services of one or more of the tap lines toward its or their proprietary companies would of itself be no justification for the annulment of the findings and the orders as to some other companies on the ground of arbitrary action, if the latter are based upon substantial evidence.

In *Crane Iron Works v. United States*, 209 Fed. 238, the industrial railroad of the iron works, separately incorporated as the Crane Railroad Company, performed switching services both for its proprietary company and for other industries in the neighborhood, to which its tracks were extended for that purpose. It also moved cars from point to point within the plant of the iron works. It imposed a charge of \$2 per car both on the iron works and on the independent industries for performing this switching service. The Central Railroad of New Jersey, the trunk line with which it connected, allowed it 5 to 6 cents per ton to absorb this switching charge on the nonproprietary traffic, but refused to make any allowance on its switching for the iron works. This refusal was held to be justified and the result was

sustained in the Commerce Court. It was contended that the Crane Railroad Company was a common carrier, being organized under the railroad law of New Jersey, which declared that all railroads so organized should be common carriers. The Commerce Court said:

It is not necessary to discuss whether the Crane Railroad is in fact a common carrier within the meaning of that term as used in the act to regulate commerce, because we shall assume for the purposes of this case that it is a common carrier subject to the act, and the matters in dispute will be decided on that assumption. (p. 241.)

* * * * *

Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works, and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Company v. N. Y. C. & H. R. R. Co. et al.*, 14 *Interst. Com. Com'n R.* 237; *Solvay Process Company*

r. D., L. & W. R. R. Co., 14 Interst. Com. Com'n R. 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

* * * * *

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers. Whether considered from the standpoint of law or of practical administration, it seems reasonable to hold, as the Commission virtually held in this case, that a railroad of the kind in question may have this dual character and perform services for one concern which are not the services of a common carrier, but which that concern is bound to provide for itself, notwithstanding it occupies the relation of a common carrier to other concerns and the public generally. Concededly, the work which the Crane Railroad does in moving cars between different points in the iron works' plant has none of the incidents of common carriage, and why may not the same thing be affirmed of the work it does in switching cars for the iron works to and from the exchange track with the Central Railroad, even if the work it does for the other industries makes it as to them or the shippers of Catsauqua a common carrier (pp. 242-244)?

This is an admirable statement of the principles which should have guided the Commerce Court in the disposal of the present case. Had these principles been adhered to, the present order of the Commission must necessarily have been sustained.

The doctrine is no new one with the Commission. *Kaul Lumber Co. v. Central of Ga. Ry. Co.*, 20 I. C. C. 450, involved the legality of an allowance of 2 cents per 100 pounds on yellow pine lumber made by the defendant railway to the tap line of the complainant company on yellow pine lumber and its products manufactured by the latter. The tap line, while not incorporated, was a common carrier under the laws of Georgia and served others on its lines besides its proprietary company. The Commission held that it was unnecessary to decide whether the tap line was a common carrier; that since its service for the lumber company was a pure plant facility service, the allowance therefor was unlawful.

No decision by this court or the lower Federal courts has been found which holds this distinction improper as matter of law. In *United States v. Balt. & Ohio R. R. Co.*, 231 U. S. 274, it was decided that *under the facts of that case* the Commission was not justified in finding that the terminal company was performing purely a plant service in transporting its own sugar but a public service in transporting the goods of other shippers. But there the defendant railroad had held itself out, and was therefore obliged, to deliver under the through rate within the New York

lighterage limits; and the terminal company, acting as the defendant's agent, was held to be entitled, not to a division out of the through rate, but to reasonable compensation under section 15 for performing a service connected with transportation which the defendant would otherwise have had to perform. The situation there was identical with that in the present case within the three-mile limit, where the Commission in effect permitted allowances under section 15 to *all* tap lines performing for their proprietary companies a substantial service of transportation which the trunk lines would otherwise have been obligated to perform without additional charge.

On principle, the distinction adopted by the Commission seems a highly proper one. If an unincorporated tap line making no pretense of carrying for the public at large is performing a service for the industry which has always been regarded as strictly accessorial, it is difficult to see why the mere fact of its incorporation and the movement of a trifling amount of traffic for outsiders should be held to change entirely the nature of that industrial service. That transportation by an industrial railroad to or from the point at which the service of the trunk line, and hence interstate transportation, begins or ends is an accessorial service can no longer be questioned.

Gen. Elec. Co. v. N. Y. C. & H. R. R. R. Co., 14 I. C. C. 237.

Solvay Process Co. v. D., L. & W. R. R. Co., 14 I. C. C. 246.

In the Matter of Allowances for Transfer of Sugar, 14 I. C. C. 619.

Chicago & A. Ry. Co. v. United States, *supra*.

Ches. & Ohio Ry. Co. v. Standard Lumber Co. (C. C. A. 4th C.), 174 Fed. 107.

Industrial Railways Case, 29 I. C. C. 212.

Yet the essential character of this service is in no way altered by the fact that the tap line *incidentally* transports goods or passengers for others.

It must be conceded that no hard and fast line can be drawn: that the difference between an accessorial service and a service of transportation by an interstate carrier in each instance will be one of degree dependent upon all the circumstances of the case. But the fact that the legal status of the service turns upon a difference of degree is no objection. As was recently said by Mr. Justice Holmes, dissenting, in *Le Roy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U. S. 340, 354:

The whole law does so as soon as it is civilized. See *Nash v. United States*, 229 U. S. 373, 376, 377.

And it is peculiarly in instances like the present, involving questions of reasonableness and discrimination, that the legality of a certain course of conduct may well be held to depend upon the administrative judgment of the Commission acting on the particular facts presented, and not upon the adoption of some hard and fast criterion.

(d) The attack on this feature of the case must therefore come down to the contention that there was no substantial evidence in the record to support the finding that these appellees, at least so far as the movement of the traffic of their proprietary companies was concerned, were not actually and in good faith common carriers. A brief reference to certain facts recited by the Commission and appearing of record will suffice to answer this contention.

LOUISIANA & PACIFIC RAILWAY.

It was shown, as we have seen, that this so-called railway, together with four manufacturing lumber companies and one selling agency company, were all controlled by the same individual owners, R. A. Long, and his associates; that they had common officers and a common office; that the several disconnected branches now operated under this name were originally built as private logging roads by the lumber companies and that the incorporation took place only after the passage of the Hepburn Act in 1906; that this railway company, together with its proprietary lumber companies, had entered into contracts with the Frisco and Southern Pacific, or their subsidiaries, agreeing to deliver to the Frisco Company 50 per cent of the traffic from the proprietary mills and to the Southern Pacific Company 40 per cent, leaving but 10 per cent to be routed over other lines; that as to this proprietary traffic a specific agreement was made for the division of rates, with a covenant to make such divisions

as should be reasonable and fair on other commodities, thus making themselves the very classification and distinction between proprietary and nonproprietary traffic of which they now complain when made by the Commission; that as the result of these special contracts the proprietary lumber companies profited through this railway not only by a division of rates but by escaping demurrage on cars and by procuring free transportation for the officers of the lumber companies when engaged about their business; that the total movement of lumber for the fiscal year 1910 was 243,122 tons, and of merchandise and other commodities 8,819 tons; that 98 per cent of the entire tonnage was supplied by the controlling interests; that a few passengers were carried, the revenue from that source for the same year being \$473.77 out of a total operating revenue of \$220,985.94; that the average log haul was about 30 miles and the average lumber haul about 20 miles; and that the logs of the proprietary lumber companies are hauled from the forest to the mills by the tap line free of charge. Certainly these are all pertinent facts to demonstrate that the Louisiana & Pacific is a common carrier in name only; that its actual service to the public is so slight as to be utterly negligible, and that the sole purpose and object of its incorporation and holding out was to secure illegal divisions and allowances out of the through rate on the traffic of its proprietary companies.

WOODWORTH & LOUISIANA CENTRAL RAILWAY.

It is shown that the tap line and the lumber company are not only identical in interest but have the same principal officers; that the right of way of the tap line's main track is leased from the lumber company; that the log haul to the mill is performed without charge against the company; that there is no passenger service; that during the fiscal year 1910 40,707 tons of freight were handled for the lumber company, and 2,100 tons of outside traffic were carried, consisting of merchandise, farm products and miscellaneous material; that there are no nonproprietary lumber mills for it to serve; and (most significant of all, perhaps) that there were no joint rates except on lumber. Surely, unless a plant railroad becomes a common carrier by the mere facts of incorporation and the transportation of *any* freight for third persons for hire, this railway is nothing more nor less than a plant facility.

MANSFIELD RAILWAY.

It appears of record that this tap line has an equipment consisting of one locomotive, one passenger coach, and one box car, the logging cars being owned by the logging company, a subsidiary of the proprietary lumber company; that its line is 16 miles long and terminates at a logging camp in the woods; that the logging company moves the logs from the woods to the mill over the incorporated tracks of the tap line, which bears the entire expense of maintaining those tracks; that the tap line serves no other

yellow pine mills except the proprietary mill, and that the one hardwood mill served by it obtains a substantial portion of its logs from the proprietary company; that it has joint rates on hardwood as well as on yellow pine lumber, but apparently on nothing else; that during a single year 28,596 tons of lumber were handled, of which 91.4 per cent were supplied by the proprietary company; that 16,539 tons of miscellaneous freight were carried, a considerable proportion of which was handled for the controlling interests or their employees; that the revenues from passenger-train operation aggregated in a year only \$1,209.76, while its freight revenue was \$25,617.19; and finally, that the switching services for the proprietary company, on which the tap line received allowances, were, first, to the Kansas City Southern over a three-fourths mile track, substituted for a spur track of the last-named trunk line, 300 feet long, which had been torn out; and, second, 2½ miles to the Texas and Pacific, a distance made up by switching the lumber back over the tap line and then to the junction, although the tap line crossed the right of way of the Texas and Pacific within a short distance of the mill. While the pretense of performing a common-carrier service is more substantial in this case than in that of the Woodworth and Louisiana, the facts recited were sufficient to justify the Commission in concluding that the tap line was performing no substantial common-carrier service in interstate commerce, but was acting as a mere plant facility of the proprietary company.

VICTORIA, FISHER & WESTERN RAILROAD.

This line, it appears, has an equipment of five locomotives, four cabooses, three box cars, one flat car, and 105 logging cars. It operates no trains on regular schedule; it carries no passengers; more than 99 per cent of its total tonnage is furnished by the proprietary company; it apparently serves no other mill and has joint rates on no commodity except lumber. In short, the tap line is quite comparable to the Woodworth and Louisiana in the extent and character of its public service.

These facts, we believe, are quite sufficient to justify the conclusion that these tap lines were not *bona fide* common carriers at all; that their ostensible public service was a mere cover for divisions out of the through rate which they could not hope to receive in their capacity of plant railroads. The same facts suggest quite as strongly the inference that, whatever their status generally, the service performed by them for the proprietary companies was strictly accessorial. Not only was this service unaltered in its physical aspects after incorporation; in all other respects as well the change was a mere matter of bookkeeping, and sometimes not even that. The failure of the tap line to charge the proprietary company for moving the latter's logs to the mill or for allowing the use of its tracks for that purpose is particularly significant in this connection. Such a free service of transportation by a carrier for a shipper is legally inconceiv-

able, and strongly supports the view that the parties regarded the situation as essentially unchanged by the change of front.

In annulling the order, the Commerce Court said:

* * * the Commission *impliedly*, if not expressly, held them to be interstate carriers when it *authorized* and in effect directed the reestablishment of through routes and joint rates as to the nonproprietary traffic, inasmuch as the Commission is without authority to make such an order except as between interstate common carriers (209 Fed. 249).

* * * * *

As the actual service rendered by the tap line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and nonproprietary mills, and as this is held to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former (p. 258).

The parties themselves, without exception in any case, and in two cases by their express written contracts, separated the traffic into two separate and distinct classes, viz., traffic of the proprietary companies, and traffic for other shippers. The traffic of the proprietary companies was the traffic which was, without exception, the subject of the special arrangements. The parties were interested only in the allowances on their own traffic, as such allowances gave them the preferences and discriminations which they sought. Any allowances to them on other merchan-

dise for the public was a mere incident, with which they were not concerned.

Louisiana & Pacific does not solicit the traffic of the public, and its own agents route such traffic over Lake Charles & Northern (Vol. I, R. 702, 703).

The appellees should not prevail in their effort to break down and destroy the stupendous and magnificent labor of the Commission extending over a period of years because it *impliedly recognized* certain tap line companies as carriers of an insignificant amount of traffic for the public, which the parties themselves had separated from their own, and as to which the Commission authorized through routes and joint rates. *De minimis non curat lex.* The Commerce Court gave too much weight to that element of the case and its holding should be reversed.

The Commission found that the preferences and discriminations prohibited by the Act to Regulate Commerce grew out of the traffic of the proprietary companies. The record abounds in evidence on the subject, and the particular advantages of the parties may be thus summarized:

First. The allowances of 1½ cents to 5 cents per 100 pounds from the freight rate, and the resultant advantages of these lumber companies over their competitors in the transportation and sale of lumber in the markets. Some of the mills turn out 2,500 cars a year. Four cents per 100 pounds on the basis of 50,000 pounds to the car would amount to \$50,000 to a single company within a single year (Vol. I, R. 660). For the year ending June 30, 1910, Butler

County Railroad Company shipped 6,593 cars for Brooklyn Cooperage Company (R. 29). Louisiana & Pacific Railway Company handles more than 1,000 cars per month for the lumber companies (R. 59).

Second. The use by the lumber companies of the incorporated tracks, switches and sidings as holding yards for loaded and empty cars of the trunk lines, which enables them to evade all demurrage and car service charges. The tracks of the tap lines are merely the switching facilities in and around the plants of the lumber companies, where the tap line companies may hold the cars of the trunk lines on the basis of 50 cents a day over six days free time instead of the lumber companies paying the usual \$1 and \$2 per day over the 48 hours free time. The tap lines may hold the cars until the lumber companies are ready to load. An order may then be given, the cars set, loaded and returned in a time so short as that the lumber companies may absolutely avoid all demurrage and car service charges which would accrue if the tap lines did not stand between the trunk line carriers and the lumber companies.

Third. The use of free interstate transportation distributed wholesale to the officers and agents of the lumber companies and used by them in traveling in the interest of the lumber companies, or in their own interest. R. A. Long has a private car, and may have transportation as far East as Buffalo. All of the officers of the Louisiana & Pacific and the lumber companies have transportation over the trunk lines (Vol. I, R. 711, 712). E. A. Frost and E. T. Whited,

president and vice-president of Frost-Johnson Lumber Company, are also fully supplied with transportation over as many as 8 trunk lines.

The Commission properly concluded that in each instance the service performed for the proprietary company was a plant service by a plant facility, and that to hold otherwise would perpetuate unjust preferences and discriminations.

2. That the switching service within 3 miles of the trunk line, being one which the trunk line held itself out to perform under the through rate, was a service "connected with transportation" when performed by the shipper or its agent; but that switching for a greater distance so performed was purely an accessorial service.

It was conceded by the Commerce Court that the Commission might properly have taken cognizance of the custom of the trunk lines as to the distance within which switching should be free, namely, 3 miles. In its opinion, however, the Commission did not do this, since it extended the blanket rate to mills on a common carrier tap line connecting with a trunk line irrespective of their distance from the latter.

In this connection, we submit, the Commerce Court overlooked the legal distinction which lay at the foundation of this branch of the Commission's order: the distinction between the service performed by a common carrier itself, and that performed by a shipper for a common carrier. The former is the service which a *common carrier* tap line performs in transporting commodities, whatever distance it extends from the trunk line or carries the goods. The latter

is the service rendered by a *plant facility* tap line in switching the product of its proprietary company or of third persons to the trunk line, under circumstances where the latter would otherwise have to do this switching under the through rate. With this distinction in mind it will be seen that the Commission did give effect to the custom adverted to and made it the basis of a formal regulation.

The test applied was an eminently proper one. Whether a service performed by or for the shipper is "a service connected with transportation" for which he may reasonably be compensated under section 15 has been invariably held to depend upon whether it is a service which the common carrier has held itself out to perform, and could therefore be compelled to perform, without additional charge.

Such has been the uniform ruling of the Commission. *Gen. Elec. Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237, 245, where it is said:

In our judgment the complainant does nothing within its plant which it can lawfully call upon the defendants to do for it and therefore nothing for which it may lawfully demand compensation.

In *Solvay Process Co. v. D. L. & W. R. R. Co.*, 14 I. C. C. 246, 249, it is said:

We find that the switching service performed by complainant within its plant is not a service which it can lawfully call upon defendants to perform for it, and consequently is not a service for which it may lawfully demand compensation.

In the Matter of Allowances for Transfer of Sugar, 14 I. C. C. 619, 627, it is said:

It necessarily follows that if the allowance is to be sustained the transfer of goods to the possession of the carrier must be held to be the carrier's duty, for which the shipper making the transfer is entitled to compensation.

In the *Industrial Railways Case*, 29 I. C. C. 212, 230, the Commission, after referring to the above cases, said:

It will be observed in the cases cited that the line carriers were declining to perform any service within the plant beyond the interchange point, and we held that no service beyond that point could lawfully be required of them and, therefore, that they could not be required to make an allowance to the industries for doing the service for themselves with their own facilities.

The same principle has recently been recognized by this court in *United States v. Balt. & Ohio R. R. Co.*, 231 U. S. 274, 293, where it is said:

if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. (Italics ours.)

Again, in *Int. Com. Comm. v. Diffenbaugh, supra*, p. 46, the effect of section 15 is thus explained:

The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. * * * *As the carrier is required to furnish this part of the transportation upon request* he [the shipper] could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. (Italics ours.)

In *American Sugar Refining Co. v. D. L. & W. R. R. Co.*, 200 Fed. 652, 656, the District Court dealt with the contention that draying from the complainant's refinery to the station was a service for which compensation could be had under section 15, as follows:

The plaintiff does not contend that transportation begins at the factory, but insists that, while such draying may not be transportation, it is a "service connected with" transportation, within the meaning of section 15; but the phrase "service connected with" such transportation, as used in such section, can be given no more comprehensive meaning than the similar phrase "service in connection with" the receipt of property to be transported, contained in section 1. The argument that at common law a common carrier, in the promotion of its business, could contract to dray the goods from the factory to its railroad is not helpful in this discussion. Many of the common-law rights of carriers have been taken away; and in the matter of making allowances

for services rendered in connection with transportation it is perfectly manifest that the only services of the shipper that can be compensated for by the carrier, under the statute, are such as are rendered by the shipper after the carrier's duty to take and transport the goods has begun.

It will not do, therefore, to say that transportation, although by a plant facility tap line, is nevertheless transportation within the meaning of section 15 whatever the length of the haul, and hence that the trunk line must pay for it under section 15. It might far more reasonably be argued that *no* transportation performed by way of delivery to or receipt from the trunk line is a service connected with interstate transportation, but that such switching is a purely private service, performed by the tap line owner, like any other individual, in his own behalf, and hence to be paid for by him. This was practically the result arrived at by the Commission in its latest utterance on the subject, *Industrial Railways Case*, 29 I. C. C. 212, where it holds that switching services over the private tracks of a large industrial plant are not services connected with interstate transportation even though the carriers have volunteered to perform them without compensation "in excess of their legal obligation," but that transportation over such tracks—

beyond a reasonably convenient point of interchange between the rails of the carrier and the rails of the industry, either within or

without the plant, is a shipper's service and not a service of transportation which the line carrier may perform without charge or may allow for out of the rate through divisions or otherwise when performed by the industry or by its industrial railroad * * *. (Pp. 230, 237.)

That the same conclusion was not reached in the instant cases must be attributed to the Commission's recognition of the custom which imposed on the trunk line a legal obligation to switch within 3 miles.

Again, whether the service is public or private surely can not depend, as the Commerce Court would have us believe, upon whether or not the act of delivery to the common carrier is performed by means of a horse and wagon or of a locomotive running on tracks.

The language of the Circuit Court of Appeals in *Chicago & Alton Ry. Co. v. United States*, *supra*, 156 Fed. 561, is here appropriate:

Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the \$20 worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof, and that the trolleys which convey carcasses and cuts of meat from one department

to another were so arranged that the finished produce arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our judgment, the jury were warranted in finding that the tracks in question were plant facilities, as clearly as the supposititious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public.

In *Fourche River Lumber Company v. Bryant Lumber Company*, 230 U. S. 316, 323, this court said :

The Commerce Act prohibits the payment of rebates, and its command can not be evaded by calling them differentials or concessions, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a lumber company to shippers.

That the Interstate Commerce Commission has full power and authority, under the Act to Regulate Commerce, to eliminate preferences and discriminations by dealing with the particular traffic, the particular parties, and the particular devices, or any means whatsoever by which they are brought about must, under the repeated adjudications of this court, be conceded.

In *Billings v. United States*, 232 U. S. 261, 284, Mr. Chief Justice White said:

That which is settled beyond dispute may not be disregarded and be brought into the realm of that which is controvertible and questionable by the mere garb in which propositions are clothed.

The duty of the common carrier to perform and the right of the shipper to receive compensation for himself performing must therefore be coextensive. Otherwise we would reach the anomalous result of compelling carriers to pay for services which they could not possibly be compelled to perform themselves.

But the extent of the carrier's duty to perform is obviously limited by its holding out. The argument that the carrier is obliged under the act to furnish transportation and that transportation includes the receipt and delivery of the goods transported, simply begs the question. Except by the express requirements of the act in regard to connecting carriers, a carrier is under no obligation to receive or deliver beyond its own line; *a fortiori*, then, it can not be compelled to do so over the private tracks of a shipper. Only when it has held itself out in its published tariffs to perform such services for all shippers similarly situated can it be held to have incurred this obligation.

Equally obvious is it that the service thus offered to the public must be included in the rate in order

to entitle the shipper to compensation for performing it. For if it is a service for which the carrier makes an additional charge, the shipper, by performing it himself, avoids paying that charge; it would then be worse than superfluous to allow him compensation for performing it in addition. In short, section 15 contemplates a *quid pro quo*, not a gratuity to the shipper.

In the present instance the trunk line carriers had held themselves out in the region in question to receive or to deliver free over tap lines to a distance of three miles. This, then, was the limit of the service which the trunk lines could have been obliged to perform under the through rate; consequently it was also the limit of the service for which a shipper could ask a reasonable compensation under section 15. Beyond that distance, as the carrier could not have been required to accept or deliver at all, it would have been manifestly unjust to require it to compensate the shipper for so doing. No other result was consistent with the custom which the Commission found.

But perhaps so lengthy a discussion of this point is unnecessary, since this court has recognized the validity of the Commission's findings and order in this respect in the recent case of *Mitchell Coal & Coke Co. v. Penna. R. R. Co.*, 230 U. S. 247, 264, where it is said:

That station rates may be applied from mill or mine reached by spur tracks is recognized by the ruling of the Commission in the *Tap*

Line Cases, 23 I. C. C. 277, where, in dealing with the practice of paying an allowance for hauling lumber from sawmills, the Commission said (p. 293):

“In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as 3 miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than 3 miles distant the transportation offered by the trunk line commences at the mill. If, therefore, a lumber company having a mill within that distance of a trunk line undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15

whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty. *But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without discrimination, to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work.*" 23 I. C. C. Rep. 277.

In view of this ruling it is apparent that lateral allowances might have been lawfully paid. They became unlawful only when unreasonable. Whether they were so or not was a rate-making question as to which parties were directly at issue, and which the courts had no jurisdiction to determine so far as it concerned the allowances to the Altoona, Millwood, and Glen White mines. Having no jurisdiction, the parties could not by consent give it to the court, to the judge, nor to the referee.

8. Hence, that a plant facility tap line performing this service within the 3-mile limit was entitled to an allowance under section 15, but to no division out of the through rate.

As has been shown, a division out of a joint rate can lawfully be paid only to a common carrier. It follows that a tap line which is not a common carrier is entitled to nothing but a reasonable allowance

under section 15 for performing a service connected with transportation such as that performed here within the 3-mile limit.

It may be argued that this distinction results in unjust discriminations between tap lines. The discrimination, if such it can be called, is that which exists universally between shippers and carriers; and as it is a necessary consequence of the difference in legal status between the two it can hardly be termed unjust. The objection in reality goes back to the Commission's finding that certain of these tap lines are common carriers and that others are not. In regard to the tap lines before us, sufficient has been said to justify the Commission's finding in that respect.

4. That a common carrier tap line was entitled to a division or allowance out of the through rate on a haul of either more or less than 3 miles.

The legality of divisions out of the joint rate to carriers participating in the through movement is recognized by that provision of section 15 which confers upon the Commission power "to establish through routes and * * * joint rates" and to "prescribe the division of such rates * * * whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or * * * joint rates * * *."

That this gives wide discretion to the Commission can hardly be doubted. Possibly the Commission might lawfully refuse to order, or might even prohibit, the division of a through rate by common car-

riers if circumstances demanded. It is inconceivable, however, that where the Commission has exercised its discretion by establishing such joint rates and divisions, the court may step in and deny the propriety of that exercise merely because it may prove disadvantageous to third persons not common carriers. The common carrier tap lines, if not absolutely entitled to joint rates and divisions thereof, were at least entitled to receive them if the Commission saw fit to award them.

There is nothing on the record to suggest that the divisions allowed the common carrier tap lines were in any way excessive. It is therefore not necessary to discuss whether if they were that fact would afford other tap lines a just ground of complaint.

5. That the movement of the logs to the mill was not a transportation service to be paid for out of the through rate but an accessorial service for which the shipper should pay.

This aspect of the case particularly concerns the Butler County Railroad, which, as the Commerce Court pointed out, was not included in the Commission's finding that certain tap lines before it were plant facilities. It is fairly to be implied that the Commission found it to be a common carrier of the products of the proprietary mill. Its statement concerning this tap line concludes as follows (No. 836, R. 64):

For its service in moving the products of the cooperage company's mill to the Iron Mountain and to the Frisco, a distance of less than 1 mile, this tap line may lawfully receive out

of the rate nothing beyond a reasonable switching charge, which we fix at \$1.50 per car. (23 I. C. C. 629.)

This conclusion was apparently misunderstood by the Commerce Court, which said that its effect was to allow the Butler County Railroad "only an allowance but no division for the lumber traffic of the proprietary mill." (209 Fed. 261.) The payment "out of the rate" would seem to mean a division of the joint rate, not an allowance under section 15; and the fact that it is described as "a reasonable switching charge" and is measured by the carload rather than by the hundred pounds, does not militate against this interpretation. Besides, it is not clear that the Butler County Railroad, whatever its status, was entitled to anything except reasonable compensation under section 15 for performing a service which the trunk line was obliged to perform under the through rate. *United States v. Balt. & Ohio R. R., supra*. Since there is nothing in the record to show that the charge fixed by the Commission was not a reasonable compensation for the service performed, this portion of the order should be allowed to stand regardless of the precise meaning to be attached to the language of the Commission in awarding such compensation.

We therefore come to the other or negative feature of the order, its virtual denial of allowances upon the log movement. As to this the Commerce Court held that—

The effect of the order of the Commission is to find that this tap line is a common carrier

both of logs and of lumber, but * * * may receive neither a division nor an allowance for the log traffic * * * of the proprietary mill. (209 Fed. 261.)

We question the correctness of the first clause of this statement. As we have seen, the Commission undoubtedly did find that the service performed by this tap line in moving the product of the proprietary mill to the tap line was a service of transportation by a common carrier; it does not follow that it found the same with regard to the log movement to the mill. There is nothing in the order of the Commission which is determinative of this point. But since the Commission expressly declared that milling-in-transit rates and divisions therefrom were permissible when the log movement was performed by a common carrier (23 I. C. C. 297-298), we must infer that it did not find that the Butler County Railroad was acting as a common carrier in this movement.

This brings us back to the distinction, contended for above, between the legal relation of the tap line to its proprietary company and its relation to outsiders. If that distinction is sound it may equally well be applied to the log movement to the mill as to the movement from the mill to the trunk line. That it was intended to be so applied is evident from the following language of the Commission:

As with the movement of lumber from the mill, so with the movement of the logs to the mill, we must necessarily hold that it is an industrial service pure and simple, except

when performed for the lumber company over the rails and with the power and equipment of a tap line that is a common carrier not in form only but in fact as well. (23 I. C. C. 297.)

Indeed, there is more reason for observing this distinction in connection with the log movement than with the lumber transportation. The carriage of logs from the forest to the mill which owns the forest seems essentially a service accessorial to the industry. It is only by a strained construction that this movement can ever be termed part of the interstate transportation of the finished product; and the Commission has long been averse to extending the practice beyond its necessary limits. *Central Yellow Pine Ass'n v. Shreveport, Vicksburg and Pacific R. R. Co.*, *supra*. If the mere rendering of any service for third persons is sufficient to transform this particular movement from a necessary function in the operation of the plant to a part of interstate transportation, there is virtually no legal limit to the concessions from the rates which particularly favored shippers may obtain by this means.

It is only necessary, then, to inquire whether there is any substantial evidence upon the record to sustain the Commission's finding as to the Butler County Railroad in this respect.

By reference to the Commission's report on this railroad, we find that it is owned by the Brooklyn Cooperage Company, while most of the timber land which it reaches is owned by the Great Western

Land Company; that all three are subsidiaries of the American Sugar Refining Company, and that the Cooperage Company's principal output is sugar barrels for the Refining Company; that the rates from points on the tap line are in all cases two cents higher than the rates from Poplar Bluff, the junction with the trunk line, except to New Orleans and New York, where most of the Cooperage Company's shipments move; that the tap line's traffic for a given year was 184,688 tons of forest products as against 2,475 tons of other freight; that of the former, 107,527 tons were logs and cooperage material furnished by the controlling interests, and the remainder was logs and lumber products moved for outsiders, but all from timber from the lands of the Great Western Land Company; that nearly half of the miscellaneous freight was inbound machinery and coal for the proprietary companies; and that the few independent producers of lumber products were obliged to *team their logs* to the saw mills. (23 I. C. C. 628-629.)

These facts are indicative that the tap line was a mere plant facility so far as the movement of the logs to the proprietary mill was concerned. It may be argued that they equally show it to be a plant facility in moving the products of the proprietary mills to the trunk line—a conclusion which the Commission did not reach. The appellee is hardly in a position to complain because the facts shown warranted a conclusion more unfavorable to it than was actually attained. Aside from this, the fact

that all of the log movement was performed for the controlling interests or from their land is sufficient to differentiate the cases. Whether this court would reach the same conclusion from the facts presented is not the question.

6. That any allowance for switching within 1,000 feet of a trunk line was a mere device to effect an unlawful payment.

The first three appellees are prevented by this rule from obtaining even an allowance under section 15 on the products of their proprietary mills. For the Commission's statement was that "no allowance * * * ought to be made by a trunk line to a lumber company where the mill is within, say, 1,000 feet of the trunk line. * * * We should take the same view of an allowance where a short switch track to the mill has been torn out or is still available but not used in order to give the appearance of a longer haul to the mill over a spur or switch track constructed by the lumber company or by its tap line." (23 I. C. C. 294.)

In the case of the Louisiana and Pacific Railway, the haul from one of the proprietary mills was a few hundred feet. From another mill it was three-fourths of a mile; but this distance, it appeared, was made up by a long detour to the trunk line, which actually came within a stone's throw of the mill itself. The other two hauls from the mill in this case, respectively of 18 and 40 miles, run counter to the other rule concerning hauls in excess of three miles, and therefore need not be discussed here. (23 I. C. C. 593; No. 829, R. 26.)

In the Woodworth and Louisiana Central case, the haul to the Iron Mountain was only 25 feet, while the haul to the Southern Pacific, Texas and Pacific and Rock Island was six miles. (23 I. C. C. 327.)

In the case of the Mansfield Railway, the spur track of the Kansas City Southern, 300 feet long, was torn out, and a track of the tap line three-fourths of a mile long was substituted. The Commission found this to be "a mere manipulation of the situation" designed to secure unlawful allowances. And while the tap line crossed the right of way of the Texas and Pacific tracks within a short distance of the mill, the lumber was switched back up the tap line and then to the junction to make up a distance of about $2\frac{1}{2}$ miles—as obviously a manipulation as the other. (23 I. C. C. 589.)

The question may well be asked, however, why *any* allowance for such a distance was prohibited? At first blush it would seem that the shipper should have some compensation for performing some service, however slight.

The answer is to be found in a matter which is not expressly mentioned in the Commission's report but which plainly appears of record: the practice of the trunk lines in that territory. On short hauls of 1,000 feet or less it was customary for the trunk line itself to perform the switching service rather than to allow the shipper to perform it. With two or three exceptions, however, this was not done where the distance was over 1,000 feet. The Commission, taking

cognizance of this custom, concluded therefrom that any allowance for a lesser distance was not compensation for a service actually rendered by the shipper for the trunk line at the latter's request, but was in fact a rebate paid without a substantial *quid pro quo*.

That the custom referred to was some evidence of this unlawful design can hardly be questioned. There must be a point at which the carrier can more economically perform the service itself than pay the shipper for performing it. Where that is the case a payment to the shipper is not in reality a payment of reasonable compensation under section 15, but a virtual rebate. And surely, the best evidence of the nature of the payment in a given case is the practice of other carriers in the same locality under substantially similar circumstances and conditions.

It may be argued that under section 15 it is optional with the carrier to perform the service itself or to let the shipper perform it. But section 15 can hardly contemplate an uncontrolled option between the shipper and the carrier in this respect. If it did the granting of allowances for an insignificant service would be a ready means of granting preferences to some shippers and discriminating against others, wherever competitive conditions made that course more profitable to the trunk lines. And such preferences and discriminations, as has been repeatedly said, are the very practices which the act to regulate commerce was particularly designed to abolish.

This ruling comes within the principle laid down by the Commission, and approved by this court in

Mitchell Coal & Coke Co. v. Penna. R. R. Co., 230 U. S. 247, 265, that an allowance to a tap line under section 15 "is lawful only when the trunk line prefers, *for reasons of its own and without discrimination*, to have the lumber company perform the service." 23 I. C. C. 277, 294. (Italics ours.)

The Commission, on facts which it found, in some instances allowed certain companies divisions, in other instances switching charges, and in still other instances, allowances to the shippers under section 15.

Any allowances whatsoever to as many as 57 companies were stricken down as unlawful (Opinions, 179, 180), and the petitions were dismissed by negative orders. To 35 other companies the Commission likewise denied their claims, but allowed either a smaller division of the rate or an arbitrary switching charge (Opinions, 182, 183), in the amounts which the Commission found the parties were entitled to receive for the service which they rendered. To 5 other companies the Commission refused any allowances on the traffic of the proprietary companies.

No trunk line has come forward to challenge the validity of the order. Those which were brought in by summons have answered that they would allow the United States to defend. The Atchison, Topeka & Santa Fe Railway Company has intervened in support of the order. Out of a total of 97 tap line companies, against which the order was directed, 92 have accepted its terms. Only 5 have objected. Twice

the report has been sanctioned by this court to the extent of citing it as authority.

Mitchell Coal & Coke Co. v. Pennsylvania Railroad Co., 230 U. S. 247, 264, 265.

Fourche River Lumber Co. v. Bryant Lumber Co., 230 U. S. 316, 322.

The five objecting parties are met with the powerful presumptions of validity which accompany the order, which are reenforced by the nonaction of the great majority of the interested parties, and the sanction which this court has already given the report.

It can not be said, therefore, that the Commission was without substantial evidence to support its finding on this point.

V.

Assuming that the Commerce Court correctly interpreted the Commission's findings and order, the latter were not without support in the evidence nor erroneous in law.

We have tried to establish that a tap line railroad may lawfully be regarded as a common carrier for the public at large, and yet be held a plant facility performing an accessorial service for its proprietary company, even though in their purely physical aspects the two services are the same. *Crane Iron Works v. United States*, *supra*. It has also been shown that the facts of the cases now before the court were sufficient to justify such a finding with regard to the services rendered by these tap lines for their proprietary companies.

If this argument be accepted, it follows that the order of the Commission was based on appropriate distinctions and created no illegal discrimination against the tap lines or their proprietary companies even if, as asserted by the Commerce Court, it did in effect permit the tap lines in question to receive divisions out of the through rate on nonproprietary traffic, while denying them such divisions on the traffic of the proprietary lumber companies. For since only common carriers *performing common carrier service* may receive divisions out of a joint rate, it would be anomalous and utterly illegal to allow such divisions to the tap lines in question for an accessorial service merely because they or other tap lines were permitted to receive them for performing a similar service *as common carriers*. Similarly, since a shipper can not receive an allowance under section 15 for performing services which the carrier is not obliged to perform, the denial of any compensation to these tap lines for hauling proprietary lumber more than 3 miles was entirely proper.

The order was therefore within the competency of the Commission, however injurious or disadvantageous to the proprietary companies it may in fact prove. And here it is necessary to reiterate what has been so frequently stated with regard to the findings and orders of the Commission: that their

legality alone, and not their expediency, is open to judicial review.

I. C. C. v. Illinois Cent. R. R. Co., 215 U. S. 452, 470.

I. C. C. v. Union Pacific R. R. Co., 222 U. S. 541, 547.

To hold otherwise would be, in the language of this court in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, *supra*, to "usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised" (p. 470).

VI.

These conclusions of the Commission are conclusions of fact and are therefore not open to judicial review.

1. **Questions of discrimination, preference, divisions and allowances are questions of fact peculiarly within the competency of the Commission.**

The proposition that where the Commission, proceeding in the lawful exercise of its power, has found an unjust discrimination or unlawful preference to exist, its conclusions may not be questioned or set aside by the court if founded on substantial evidence, is such familiar law as to scarcely require citation of authority. Without elaborating the point we refer the court to—

Balt. & Ohio R. R. Co., v. Pitcairn Coal Co., 215 U. S. 481.

Robinson v. Balto. & Ohio R. R. Co., 222 U. S. 506.

Mitchell Coal & Coke Co. v. Penna. R. R. Co., 230 U. S. 247.

Morrisdale Coal Co. v. Penna. R. R. Co., 230 U. S. 304.

United States v. Pacific & Arctic Co., 228 U. S. 87.

A. T. & S. F. Ry. Co. v. U. S., 231 U. S. 736.

That the propriety of allowances under section 15 involves questions of reasonableness or discrimination which require the exercise of the administrative discretion of the Commission is also settled. *Mitchell Coal & Coke Co. v. Penna. R. R. Co.*, *supra*, page 255, where it was said that the determination of such a question

involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid.

The same statement would apply with even more force to the granting of divisions out of a joint rate, a matter left by section 15 of the act entirely to the Commission's discretion where the carriers themselves can not agree on the division. This was recognized by the Commerce Court in *Crane Iron Works v. United States*, *supra*, where the Commission's refusal to grant a division to the Crane Railroad Co. was expressly sustained on this ground. The court, after

quoting that part of section 15 which authorizes the Commission to establish joint rates and prescribe the division thereof, said (p. 242):

That this invests the Commission with discretionary power, and was so intended, can not be seriously doubted. Not only is the grant of authority permissive in form, but the entire paragraph contemplates the exercise of judgment upon the facts disclosed, and implies the right and duty of the Commission to order or decline to order joint rates, as the circumstances and conditions developed in each inquiry may seem to require. The provision for a hearing upon complaint, or the equivalent initiative of the Commission, involves the liberty and obligation of the administrative tribunal to decide a controversy of this nature upon its merits with due regard to the interests of both shippers and carriers. In short, it seems clear to us that the question of establishing joint rates or declining to do so rests in the discretion of the Commission, and it is equally clear that the refusal of the Commission in this case was a lawful and proper exercise of that discretion.

Butler County Railroad Company is similarly foreclosed by the findings of the Commission.

On the discriminations and preferences, the Commission found (Opinions, 149):

This is a striking example of the advantages that an industry can get out of a tap line that it owns and holds out as a common carrier. The sugar company, as is well known, has

important refining establishments at New Orleans and New York, and it is to its interests to have all the hardwood along the Butler County Railroad made available to it. The rates to New York and New Orleans are therefore so adjusted as to induce movements to those points and restrict movements to other points.

It is agreed that the evidence before the Commission showed "that the main-line roads in the general territory under investigation * * * establish and maintain rates for switching service ranging from \$1.50 per car to \$2 per car" (R. 75). No issue is raised in the petition, and there is no pretense, that the allowance so fixed does not more than pay the cost of the service for the switching from the mill to the trunk lines—a distance of about three-fourths of a mile. The order is presumptively valid until overthrown by competent evidence.

Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452.

Interstate Commerce Commission v. Chicago and Alton Railroad Co., 215 U. S. 479.

Interstate Commerce Commission v. Chicago, Rock Island & Pacific Railway Co., 218 U. S. 88.

In *Mitchell Coal & Coke Co. v. Pennsylvania Railroad Co.*, *supra*, this court said (263, 264):

In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers, who supplied motive power, the

Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body.

2. An inference drawn by the Commission even from undisputed testimony is conclusive upon the courts unless erroneous as matter of law.

It may be suggested that the underlying facts in this action are substantially undisputed; and therefore that, as was held by the Commerce Court in the case of *Louisville & Nashville R. R. Co. et al. v. United States*, 197 Fed. 58, 65, the drawing of the inference from such testimony was a judicial and not an administrative function, and consequently one upon which the judgment of the court could properly be substituted for that of the Commission.

That case is now before this court for review. In its brief in this court, the Government contested the attitude of the Commerce Court upon this point. It is not necessary to reiterate all that was said there. Suffice it to point out that since many cases before the Commission turn ultimately upon the proper inference to be drawn from undisputed statistics, the acceptance of such a doctrine would virtually strip the Commission of that administrative discretion which Congress has confided to it

and this court has so assiduously upheld, and would reduce that body in such cases to the position of a mere referee for the taking of testimony for the court to pass upon. It seems quite clear that no such result was intended by Congress. The Commerce Court's fallacy was in assuming that a question becomes purely one of law when witnesses do not contradict one another. In reality the question whether a particular rate or practice is unjustly discriminatory or unduly preferential is essentially a question calling for the exercise of the Commission's administrative functions, whether it depends on undisputed testimony or not. This follows of necessity from the familiar doctrine that the Commission's findings are conclusive upon the courts if founded upon substantial evidence. *I. C. C. v. L. & N. R. R. Co.*, *supra*; *I. C. C. v. Union Pacific R. R. Co.*, *supra*. For where facts may reasonably lead to either of two opposing inferences, it can not be said that either inference the Commission might draw would lack substantial evidence to support it.

It is submitted that the Commission's findings concerning the status of the appellees and the nature of the services performed for them by the proprietary companies, as well as its conclusions that any divisions or allowances except those prescribed in this order would "result in undue and unreasonable preferences and unjust discriminations," are conclusions of fact; and, being founded upon substantial evidence in the record, were beyond the power of the Commerce Court or of this court to review.

CONCLUSION.

The judgment of the Commerce Court was erroneous and should be reversed.

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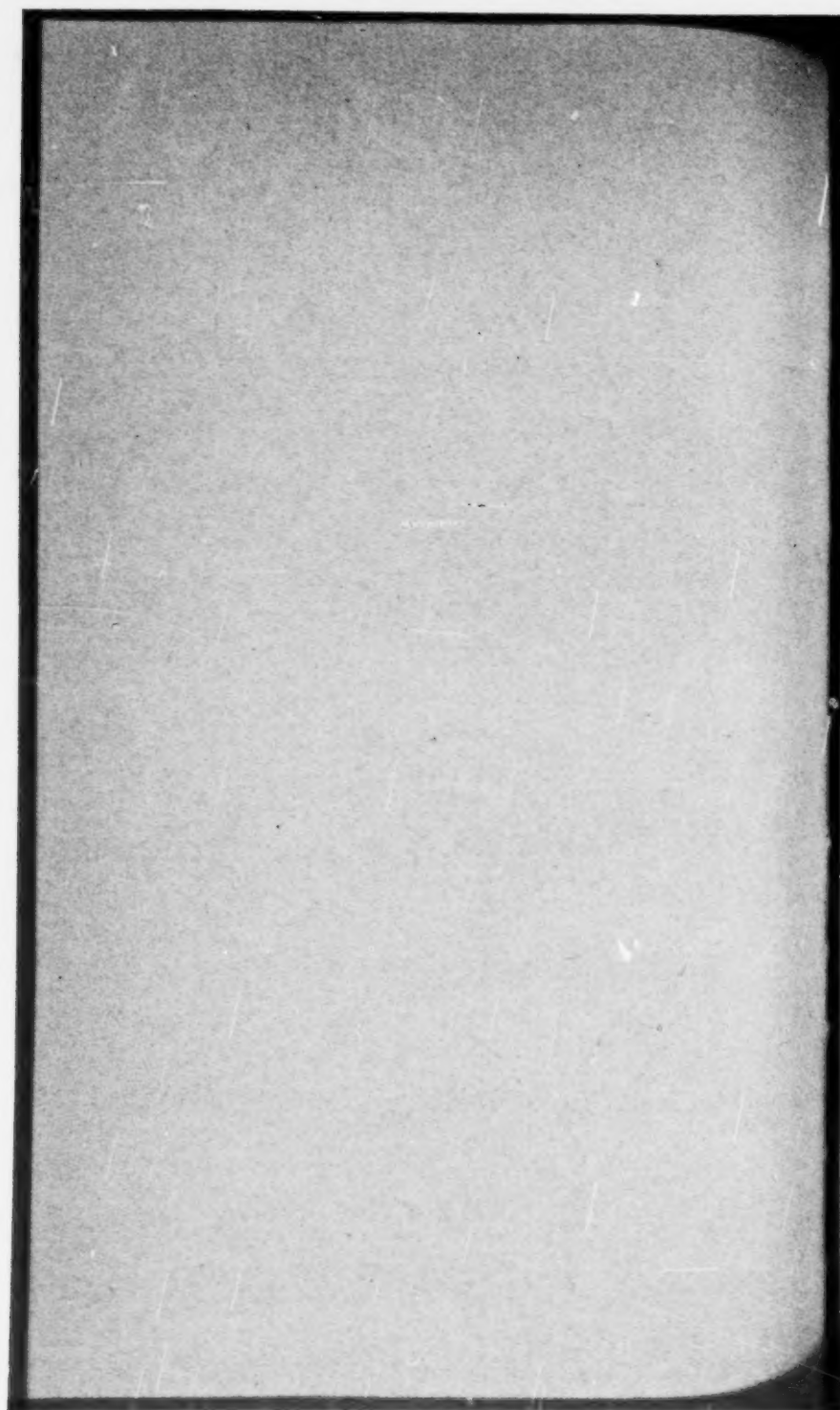
UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,

v.

BUTLER COUNTY RAILROAD COMPANY, APPELLEE.

**BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.**

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel.



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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 837.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,

v.

BUTLER COUNTY RAILROAD COMPANY, APPELLEE.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

[The matter following to page 66 (inclusive) of this brief is the same as the corresponding pages in the brief filed in this court on behalf of the Commission in the Tap Line Cases, Nos. 829, 831, 833, and 835.]

QUESTIONS OF LAW.

In view of the holding of the Commerce Court that switching on private sidings and spur tracks, and log hauls with milling-in-transit privileges, may be integral parts of through routes covered by the line

rate upon lumber, we present for consideration the following propositions:

1. A switching service on a private siding or spur track is a service which precedes or follows a line haul; it is the shipper's delivery to, or the consignee's receipt from, the line carrier; it is not a line service, therefore it can not be the basis of, or a link in a through route.

2. Logs and lumber are distinct commodities, for each of which there is a classification and commodity rate; the cost of transporting logs is a part of the cost of the logs at the sawmill; therefore a log haul performed by a carrier *free of charge* is a consideration to induce the mill owner to give the carrier his lumber traffic at the published lumber rate; such absorption of a distinct service by a carrier is rebating or "buying the traffic."

3. A milling-in-transit privilege which extends the lumber rate, for the lumber line haul, back to the forest and thereby absorbs or obliterates any charge for the log-haul, is not a true milling-in-transit privilege and is unlawful.

4. A tap line or industrial road may be so owned, organized, and conducted as to be a plant facility as to the traffic of the proprietary company and a common carrier as to non-proprietary traffic.

5. It is within the powers of the Interstate Commerce Commission, upon full hearing, to determine:

(a) That the practice in a given case of absorbing switching, spur track, and log-haul services in order to secure the shipper's lumber traffic creates undue discrimination, favoritism, and rebating.

(b) That a milling-in-transit privilege which has the purpose and effect of rendering to the shipper a free service in transporting raw material for him, in order to secure the shipper's traffic of manufactured commodities, is unlawful.

(c) That a tap line or industrial road is a plant facility as to the traffic of the proprietary mill, while it may be a common carrier as to non-proprietary traffic.

I.

A switching service upon a private siding or spur track is an independent service which precedes or follows a line haul.

Matters to be excluded.—The discussion under this head has reference solely to the movement of cars between the private warehouse or place of business of a shipper and the point on the private siding (free of the line tracks) where connection is made with the main line. We have no reference to the carrier's delivery in shunting cars upon the private sidings free of the main track, or switching between line carriers in a through route, or deliveries upon public team tracks. We contend that the movement of cars upon private sidings is a shipper's service, tak-

ing the place of, and being a substitute for, the truck or team delivery by shippers generally.

Loading and unloading carload traffic.—It is the universal practice for shippers and consignees to load and unload carload shipments. The carrier receives the car loaded from the shipper and delivers it loaded to the consignee. The line haul for which a line rate is charged is between the points of such receipt and delivery by the carrier. All services outside the line haul are additional services for which the carrier may properly claim additional compensation.

Absorption.—We do not contend that a carrier may not absorb this additional service where it does not work undue discrimination or operate as a rebate. This court and the commission have held that a switching service may be performed without extra charge; that is, may be absorbed by the line carrier. Our contention is that a shipper having a private siding, has no right to have this additional service absorbed, and that the commission may prohibit it where such absorption operates as an undue discrimination against shippers of like traffic who are obliged to deliver their traffic upon public or team tracks. The phrase "*absorbing the service*" means, and is interchangeable with the term, "*free service*."

Switching and interplant service.—Before the extension of the definition of the word "transportation," by the act to regulate commerce, the word, as used at common law, was equivalent to what is now termed the line haul. Transportation, when carried on by a common carrier by railroad, was the business

of receiving traffic from shippers at designated points on the rail-line and delivering the same to consignees at other designated points on the line. It was the shipper's business to bring his traffic to the carriers at the points of receipt, and of the consignee's to take it away from the points of delivery. In the case of carload freight the delivery by the shipper included the loading, and the consignee unloaded the freight.

Switching and its relation to the transportation was clearly defined by the Supreme Court of Georgia.

The test of distinction between "transportation" service, relative to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" services, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned. (*Syllabus*.)

Dixon v. Central of Georgia Ry. Co. (110 Ga., 173; 35 S. E., 369, 372).

Statutory definition.—In 1904 the English statute was adopted requiring carriers, for the accommodation of shippers, upon certain conditions, to con-

nect with private sidings and to operate them. But, as we shall see from a clear line of authorities, the distinction theretofore prevailing, that this was *additional service* for which compensation could be required, was recognized.

Our act to regulate commerce, as amended June 29, 1906, provides that:

The term "railroad" as used in this act shall include * * * all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, * * * and the term "transportation" shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit * * * and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. * * *

Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and *operate upon reasonable terms* a switch connection with any such lateral, branch line of railroad, *or private side track* which may be constructed to connect with its railroad, where such connection is reasonably prac-

licable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same (Sec. 1).

When the carrier refuses to furnish these facilities the commission is authorized to require the same "and shall determine as to the * * * *reasonable compensation* therefor * * *."

Additional compensation.—The words above quoted, "and operate upon reasonable terms a switch connection," etc., when considered in connection with the debates in Congress, should, we think, be construed to mean that the carrier may be required to operate the cars upon a switch. This construction arises in consequence of the fact that private sidings are in many cases for the accommodation of shippers who have no locomotives with which to move cars upon the switch or spur.

The use of the words "upon reasonable terms" and "reasonable compensation therefor" is a clear recognition that the services performed upon the switch in operating the cars is a service additional to the line haul. It is not a part of the delivery which the carrier is required to make of carload freight. Prior to these enactments the carrier could not be compelled to operate a switch; it was not a part of the transportation; delivery of car lots was made by shunting the car upon the private switch clear of the main track; the "spotting" was additional service performed voluntarily, usually under contract. The statutes both in England and in the United States

recognize it as additional or extra service by providing that carriers may be compelled to put in and operate switches only upon the payment of reasonable compensation therefor.

Lateral line.—This is true as to spurs and lateral lines. Such lines are longer than a "switch," put in to reach a warehouse, mill, coal mine, or forest. The same general designation appears in the English statute—"private sidings or private branch railways." The phrase "lateral branch" in the act to regulate commerce has been construed by this court to mean lines "that are dependent upon and incident to the main line—feeders such as may be built from mines or forests to bring coal, ore, and lumber *to the main line for shipment.* * * * That some shippers would be accommodated by a switch connection is not enough." (*United States v. B. & O. Southwestern Ry.*, 226 U. S., 14, 19.)

Whatever the legal construction of the word "operate" may finally be, there is a clear recognition that the services upon a switch, spur, or lateral branch line of road are services additional to the main-line haul and are not included in it. The "line haul," as it is always defined, includes the taking of a car from the team track or *from the junction point* of a private siding and conveying it to the point of destination and delivering it either upon the team track or upon the private siding *clear of the main track.*

The following English and American authorities state the law upon this subject. The doctrines established by these authorities will be discussed after the citations are given. Our act is similar to the English statutes and their courts have decided the question under consideration here.

ENGLISH AUTHORITIES.

Fourth Edward VII, chapter 19, provides that an abutting property owner is entitled to a siding connection with the railway, and section 2 of the Railway and Canal Traffic Act of 1854 provided that a trader is entitled to all reasonable facilities, etc. This language is defined in the statute first above referred to as follows:

The reasonable facilities which every railway company is required to afford under section 2 of the Railway and Canal Traffic Act of 1854 as amended or explained by any other act, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by such company, and reasonable facilities for receiving, forwarding, and delivering traffic upon and from those sidings or private branch railways.

The charges which may lawfully be imposed by a railroad company in England are fixed by the provisions of the Rates and Charges Order Confirmation Act applicable to particular companies. These acts are substantially similar and provide for (see

54 Vict., ch. 121): (1) Maximum conveyance rate (line haul); (2) maximum station terminal rate for use of station accommodations; (3) service at terminals, maximum rate for services in connection with the loading, unloading, covering and uncovering of merchandise; (4) special charges, including, *inter alia*, “services rendered by the company at or in connection with sidings not belonging to the company.”

The English cases define with considerable detail the obligations of railroad companies to afford reasonable facilities for receiving and forwarding goods and passengers. The decisions, construing the statutes, recognize the common-law obligations of rail carriers to transport and perform services upon their lines, and distinctly hold that there is, outside of the statute, no obligation to perform services off their lines. Services performed by a carrier upon private sidings are held to be additional services and are required of carriers by statute only upon payment of reasonable compensation therefor.

Referring to the operation of a private switch, Sir Frederick Peale said:

The far end of the siding where Pidecock and Company load and unload is at some distance from its junction with the railway, and the railway company, besides delivering at the junction, take the truck on to the farther end of the siding. This, of course, is a voluntary service on their part, for no com-

pany is bound to travel beyond its own railway.

M. S. & L. Ry. Co. v. Pidcock & Co., 10 Ry. and Ca. Tr. cases, 150, 159.

In a case arising under section 6 of the Board of Trade Arbitrations Act, 1874, and under sections 5 and 7 of the schedule to the North Staffordshire Railway Co.'s Rates and Charges Order Confirmation Act, 1892, Sir Frederick Peel said:

The North Staffordshire Railway Company claim to be repaid certain expenses incurred by them * * * for works and services at the junction with their railway of sidings belonging to the Salt Union. * * * As to the shunting services for which the railway company claim to be paid, according to the time their engine is engaged shunting, at the rate of 7s. per hour, the schedule to the Charges Act, section 5, subsection 1, gives a railway company power to charge a reasonable sum *by way of addition to the tonnage rate* for "services rendered at or in connection with sidings not belonging to them," but the Salt Union deny that the shunting that is done for them at Malkins Bank or Wheelock is more than is incidental to conveyance. * * * The service the staff perform seems to be a necessary one. * * * I think, therefore, the railway company's claim, as it respects the Salt Union, may be allowed.

Wright, J.: I also agree with the judgment which has been delivered, and I have only to add a statement of the law as we

understand it and have applied it with reference to the railway company's claim to make an extra charge for services on their own line in the delivery and collection of traffic at the traders' sidings.

It is not implied in our judgment that the railway company can charge beyond the conveyance rate for anything done on their own lines which is properly incidental to delivery or collection of traffic to or from sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect. The very existence of the siding implies in practice that the railway company must, in order to collect and deliver from or to the siding, do on their own lines something beyond the mere work of transit. But they may be entitled to make a carrier's or service charge if they are required, for the convenience of the siding owner, *to do work on his siding*; and where they are so required, then, if by reason of the insufficiency of the siding or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge. For instance, a siding may, from its limited size or its situation, be such as not of itself to afford sufficient accommodation for the delivery or collection of its traffic. In such a case, if for the convenience of the trader the company work in and out of the siding, and if in order to do so they

are obliged to make an extraordinary use of their own lines, it may be that their lines would be regarded for this purpose as a prolongation of the sidings, and the company may, according to the circumstances, be entitled to that extent to be paid for the extraordinary work done on their own lines, as if their lines were a part of the sidings themselves.

N. S. Ry. Co. v. Salt Union Limited, 10 Ry. & Ca. Tr. Cases, 161, 164, 167.

Upon complaint made by a shipper having a siding that the rate charged was unreasonable, the carrier defended the rate on the ground that part was "for services at or in connection with a siding not belonging to the company." Wright, Justice, said:

Owing to the inconvenient position of the applicant's siding, the railway company have to haul the trucks *past the mouth of the siding, and do something beyond the point at which they would naturally deliver.*

Sir Frederick Peale said:

Now, if the mode in which a junction has been affected is such that a company need incur no greater expense in connection with it than is involved in stopping a goods train specially at the siding junction, and either uncoupling trucks there and *depositing them in the siding clear of the points*, or drawing out trucks *ready marshaled* and attaching them to the train, *doing no work within the siding*, * * * there is then a

mere delivery for which no extra payment is due.

Portway v. Colne Valley & H. Ry. Co. et al., 10 Ry. and Ca. Tr. Cases, 211, 217, 220.

In another case involving services upon a private siding, Lawrence, J., said:

The main question of fact in dispute has been: Does the railway company perform any service in respect to this traffic beyond what they are bound to do as carriers *conveying it from one private siding to another*. If they do they would be entitled to charge a reasonable sum in respect thereof under section 5, subsection 1.

Birmingham v. M. R. Co. Ry. Co. et al., 14 Ry. & Ca. Tr. Cases, 24, 33, 34.

In one of the earlier Railway & Canal Traffic cases the court said:

We think the traders [owners of the siding] will do all that is necessary on their part to entitle them to have their traffic taken by the company, without extra payment, *if they place their trucks as near to the junction of their sidings with the main line as they can be brought with safety to the main line*, and with sidings constructed as theirs have been; and if also they take care to arrange their trucks in proper order and clear of any obstacles to their being moved away. * * * Subject, therefore, to the traffic being presented in the way we have mentioned, we are of opinion that the company are bound to receive and forward it for the mileage

rate, and free of any charge for terminal services.

Watkinson et al. v. W. M. & C. A. Ry. Co., 3 Ry. & Ca. Tr. Cases, 5, 9. See also *Birmingham et al. v. Mid. Ry. Co.*, 9 Ry. & Ca. Tr. Cases, 165.

AMERICAN AUTHORITIES.

Private sidings.—A private siding put in at the cost of the shipper or partly at the cost of the shipper and partly at the cost of the railroad is not a part of the railway company's line. As we shall see, the courts of this country in passing upon the question of services upon private sidings hold distinctly that, at common law, a railroad company is not obligated to perform any service *off its own line*; that such additional services are the subject of private agreement. The statute has modified the common law but recognizes the service *as additional to the line haul*.

The Circuit Court of the Western District of Kentucky, speaking through Evans, district judge, in construing the rights of third persons to use a switch connection put in at the instance and for another person, said:

A common carrier cannot be required to receive freight on or along a private switch. Its duty in that regard is confined and limited to its own depots or shipping or receiving points.

Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. Rep., 441, 449.

The Supreme Court of Indiana, speaking through Chief Justice Mitchell, said:

It is undoubtedly true that a carrier is not liable for failing to furnish cars, and for not transporting goods, unless goods are offered at a regular depot, or other usual or designated place for receiving freight. * * * All that can be done by the owner of goods of the character and quantity of those described, which are designed for transportation, is to place them contiguous to the railway company's track at some usual or properly designated place and request the company to furnish cars and receive the goods.

L., N. A. & C. Ry. Co. v. Flannagan et al.,
14 Northeastern Rep., 370-1-2.

In a case brought to recover a penalty for delay in transporting freight, decided by the Supreme Court of North Carolina, Brown, J., said:

The first assignment of error is that his honor erred in holding that the defendant was required not only to transport the car from Cary to Greensboro within the statutory period, but must within that time place the car upon the plaintiff's side track.

* * * Although this [State] statute was amended by chapter 461, Acts 1907, so as to require a delivery at destination within the time specified, we have held that when the goods arrive, and the carrier has notified the consignee that it is ready to deliver, it has discharged its duty. *Wall v. Railroad*, 147 N. C., 411; 61 S. E., 277. But this statute

as amended does not undertake to compel a railway company to deliver loaded cars off its own right of way and tracks on to the private track of an individual or private corporation. Therefore, a delivery of the car load of lumber to plaintiff upon its private track, belonging to it and leading to its mill, must of necessity be a matter of agreement between plaintiff and defendant and cannot come within the purview of section 2632. A railroad company cannot be compelled to operate its engines on a private track belonging to a private corporation or individual over which the railroad company has no control or supervision.

Brooks Mfg. Co. v. Southern Ry. Co., 68 S. E., 243, 245.

May discontinue service.—In a case involving the depression of tracks and the discontinuance of private sidings the Supreme Court of Minnesota, speaking through Brown, J., said:

At various times during the last 30 years, as the same were demanded or required, the railway company has constructed numerous side and spur tracks connecting with the main track of its said Hastings and Dakota Division, and has maintained and operated the same to deliver and receive freight cars to and from the premises of the plaintiffs. Some of these side tracks are entirely on the respondent company's right of way, and others partly thereon and partly on the lands of the plaintiffs. In some instances the railway company paid the entire cost of their

construction; in some the plaintiffs shared the cost. During the said period of 30 years it has been the unvaried and uniform custom of the respondent to furnish trackage to all such industries as located along its said right of way. Sometimes side tracks have been provided under written contracts and deeds; sometimes they have been provided to avoid proceedings before the railroad and warehouse commission of the State. The railway company has at all times encouraged and invited the location of industries along its right of way, in order to increase its freight business, and the plaintiffs, encouraged by the railway company and relying on its uniform custom, its agreements, and its statutory obligation to furnish trackage, purchased their lands and established their several plants, such plants or establishments being on grade with the railway company's track and right of way as they now stand, and the buildings of the plaintiffs being built next to the side tracks by which they are served, and so constructed as to facilitate the loading and unloading of freight directly between such buildings and the railway company's cars.

* * * The railway company, furthermore, admits that it intends to tear up and remove all these side tracks, and that it has made no plans for providing them in the future and does not intend to construct or maintain them, or any others, in the future, along the line where so depressed.

Discussing the ordinance controlling the railway company in this improvement, the court referred to the contracts under which the switches were originally constructed and said:

Contracts of this character, for the permanent location or use of their road or works, have been held to be subject to termination *when even the interest of the road itself requires it.*

This, we think, is the true doctrine that must control the instant case, and the rule as above announced disposes of the plaintiffs' contentions as to their vested rights so far as the same are predicated upon contract, prescription, or estoppel.

Twin City Separator Co. v. Chicago, M. & St. P. Ry. Co., 137 N. W., 193, 195, 197, 198.

This case shows that these private sidings were operated by the railway company as additional services, and were subject to discontinuance when the public interest demanded it although it might work financial injury to private interests. If the tracks can be taken up, certainly free service thereon can be discontinued whenever the public interest demands it.

Not a terminal facility.—The Supreme Court of Mississippi, speaking through Cooper, J., held that a mere switch was not a depot or terminal facility. (*Kansas City, &c. Co. v. Lily*, 8 Southern Rep., 644.)

The Supreme Court of Michigan, speaking through Grant, J., held that a provision in a con-

tract to build a side track, exempting the railroad company from liability for loss by fire from its own negligence, was not void, for the reason that—

In contracting to put in these side tracks, the defendant was not acting in the capacity of a common carrier. It was under no legal obligations to put them in. It might have refused.

Mann et al v. Pere M. Ry Co., 135 Michigan, 210; 97 Northwestern Rep., 721, 723.

Not covered by line rate.—In the Circuit Court of Appeals, Seventh Circuit, the court, speaking through Showalter, C. J., held:

No satisfactory reason suggests itself against the legality and propriety, under special circumstances, such as exist here and as existed in the Covington case, of such a division of his compensation by a carrier even apart from the statute. * * *

The contention that the carriers must move cattle from their lines of road over the track of the stockyards company to the stockyards, without compensation other than as contained in their charges for hauling to points on their respective lines in Chicago (and this is what the claim of these appellees amounts to), is invalid.

Walker v. Keenan, 73 Fed. Rep., 755, 762.

No vested rights.—The Circuit Court of Appeals, Eighth Circuit, Thayer, J., speaking for the court, held that a railroad company could legally decline to place cars for loading coal at the station side tracks and could insist that the mine owner accept

cars from the railroad to be loaded at the mines on private sidings prepared by the company for such purpose. The court said:

We entertain no doubt that the defendant had the right to abandon the method of receiving coal which it had adopted at Hartford when the conditions that led to the practice at that station had so far changed as to render its further continuance inconvenient and burdensome. * * *

The privilege which he demanded was essentially different from that accorded to other shippers who had built spur tracks on which cars could be placed and handled by the defendant with much less inconvenience and risk than when standing on its house tracks, which it used for handling other commodities, and for switching purposes, and probably used at times for the passage of trains.

Harp v. Choctaw, O. & G. R. Co., 125 Fed. Rep., 445, 451-2.

Interplant and delivery service.—In a case decided by the Circuit Court of Appeals, Seventh Circuit, the plaintiffs in error were jointly convicted of violating the Elkins Act. The rebate consisted in an allowance of \$1 per car to a packing company at Kansas City. The book entries read "refund of terminal charges." The plaintiffs operated a packing establishment adjoining the tracks of the Belt Line; within the plant and running around and between the various buildings thereof they had built, at a cost of \$75,000, 1½ miles

of switches and sidings on which the annual outlay for maintenance and taxes was \$1,200. The Chicago & Alton took the traffic from the Belt Line; this line published a rate of \$3 per car for hauling the car over the plant line and the Belt Line to the Alton. It was claimed that the payment was a refund of terminal charges. The real transaction, however, the court held, was a payment by the Alton for the use of the plant tracks in getting freight out of the plant to the Belt Line. The court said:

The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kans., to New York for \$20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. *Their only use was in getting a particular shipper's freight from his own property out to the public highway.* Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the \$20 worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended

that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof, and that the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished produce arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our judgment the jury were warranted in finding that the tracks in question were plant facilities as clearly as the supposititious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public.

* * * * *

This case is ruled in principle, we believe, by the decision in *Wight v. United States* (167 U. S., 512; 17 Sup. Ct., 822, 42 L. Ed., 258), that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable because the question there was of discrimination and here of rebate. Under the Cullom

Act (act Feb. 4, 1887, c. 104, 24 Stat., 379; U. S. Comp. St. 1901, p. 3154) the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the *Wight case* was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common-law pact between the railroads and the people. But it was not until the Government as *parens patriæ* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

Chicago & A. Ry. Co. v. United States,
156 Fed. Rep., 558, 561, 562.

Not obliged to receive freight on private siding.—
In an action against the Texas & Pacific Ry. Co. for damages for negligence in not keeping a watchman or agent at a station called Meekers the con-

clusions as to the obligations of the carrier regarding a switch on which this station was located are stated by Mr. Justice McKenna of this court as follows:

Meekers was not a regular station; indeed was not a station at all, but a mere switch track. *The defendant was not obliged to receive freight there.* It was, as said by the court of appeals, "a country or plantation switch," established and maintained for the accommodation of the planters of the neighborhood.

Charnock v. Texas & Pacific Ry. Co., 194 U. S., 432, 437.

Illinois cases.—These cases are based upon a constitutional provision, which reads as follows:

All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased, or used, or which can be used, by such railroad companies; and all railroad companies shall permit connections to be made with their track, so that any such consignee and any public warehouse, coal bank, or coal yard may be reached by the cars on said railroad.

In the Vincent case the complainants owned and occupied a warehouse in the city of Chicago, "situated upon the line of the defendant's railroad, and connected with it by a side track about one hundred and fifty feet in length, and situated two blocks

from the freight depot, and between that and the passenger depot." The siding was built under a written agreement which was recorded, the complainant owning the land, and the contract provided for free switching. The question was presented—

whether the appellants have a legal right to insist upon a delivery, at their elevator or warehouse, of grain consigned to them, without discriminating charges against them, such warehouse being connected with the line of the railway in the manner above stated, and, if they have such right, whether the powers of a court of chancery can be invoked to protect it.

After reciting that the railroad company could not deliver this grain in its ordinary depot and that it had been the custom to deliver grain to the elevator to which it was consigned, the court said:

If, then, the common-law rule requiring of common carriers an immediate delivery, when practicable, to the consignees, has been relaxed, in regard to railways, only from necessity, it is difficult to perceive why the rule should not be applied, in its full force, to transportation of this character. Here the necessity of relaxation has not only ceased, but the railway is compelled to seek some other warehouse than its own freight depot, and to send its cars, over a side track, to some private elevator. And where there are several elevators thus connected with the main line, in substantially the same mode, it is difficult to conceive how, as a question

merely of common law, the railway company can be permitted to deliver grain to an elevator of its own selection, in place of that to which the property has been consigned.

Vincent et al. v. C. & A. R. R. Co., 49 Ill., 33, 37-39.

The doctrine of *The Vincent case*, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed by a switch, to be connected with its own line. This rule has been reaffirmed in an opinion filed at the present term, in the case of *The People ex rel. Hempstead v. The Chicago and Alton Railroad Co.* (55 Ill., 95). But in the last case we have also held that a railway company *can not be compelled to deliver beyond its own line*, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

Chicago and Northwestern Railway Co. v. The People, 56 Ill., 365; 8 A. R., 690.

Illinois cases not controlling.—The Circuit Court of Appeals, Sixth Circuit, speaking through Taft, C. J., referred to the Illinois cases, and held that a railroad company as a common carrier is not bound at common law by the establishment and maintenance for any length of time of a switch connection with a private warehouse to maintain it. The court said:

A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either incon-

venient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that State has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. (*Railroad Co. v. Suffern*, 129 Ill., 274; 21 N. E., 824.) But this is very far from holding that there is any common-law liability to maintain a side track forever after it has once been established. The other Illinois cases (*Vincent v. Railroad Co.*, 49 Ill., 33; *Chicago & N. W. Ry. Co. v. People*, 56 Ill., 365) may be distinguished in the same way. They depended on statutory obligations and were not based upon the common law, though there are some remarks in the nature of obiter dicta which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice

Gray's opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

Jones v. Newport News & M. V. Co., 65 Fed. Rep., 736, 740.

Extra service.—If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the transportation, but outside thereof.

Southern Ry. Co. v. St. Louis Hay Co., 214 U. S., 297, 301.

By section 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered *off its own line* or

outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co. v. St. Louis Hay Co.*, 214 U. S., 297. If the terminal charge be in and of itself just and reasonable it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule the carrier must separately state its *terminal or other special charge* complained of, for if many matters are lumped in a single charge it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services. The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it.

Interstate Commerce Comm. v. Stickney, 215 U. S., 98, 105.

Freight requiring special facilities.—Referring to the liability of a common carrier to provide suit-

able facilities for receiving live stock, this court, speaking through Mr. Justice Harlan, said:

The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But, it is contended, that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, *free from any charge other than the customary one for transportation*, for merely passing into and through the yards of the Covington Stock-Yards Company to and from the cars of the railroad company.

* * *

In other words, the duty to receive, transport, and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee. * * *

There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. * * *

Covington Stock-Yards Co. v. Keith, 139 U. S., 128, 133, 134, 135.

Carrier not obligated to deliver at particular yards.—In *Central Stock Yards Company* case this

court, speaking through Mr. Justice Holmes, said:

If the cattle are to be unloaded, then, as was said in *Covington Stock-Yards Company v. Keith*, the defendant has a right to unload them where its appliances for unloading are, and can not be required to establish another set hard by. * * *

We have discussed the case as if the two stockyards were side by side. They were not, but they both were points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. * * *

As the defendant would not be bound to deliver at the Central Stock Yards *if they were by the side of its track*, its obligation is no greater because of the intervention of a short piece of the track of another railroad.

Central Stock Yards v. Louisville, etc. Ry. Co., 192 U. S., 568, 570-72.

May not discriminate by special services.—In the *Nashville Stock Yards* case, in the Circuit Court, M. D. Tennessee, Chief Justice Baxter, said:

By the permission or acquiescence of defendant, complainants' yard was connected with defendant's road by appropriate stock gaps and pens, which have been in use by both parties for more than twelve years.

The railroad company made an arrangement with the Union Stock Yards Company in Nashville for the delivery of stock and stipulated that after

a certain date it would deliver stock only at the Union Stock Yards. Complainants filed a bill to enjoin the railroad company from refusing to deliver their own stock at their private yard. The court indicates that there was involved in the case some intentional discrimination, and further said:

Or may such railroad company, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?

If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the public. By an unjust exercise

of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one community for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever.

Coe et al. v. L. & N. R. Co., 3 Fed. Rep. 775, 776, 779-80.

Charges may be separated.—In a case involving an extra charge per car in Chicago for delivering live stock to the stockyards this Court, speaking through Mr. Justice White, now the Chief Justice, said:

As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stockyards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the circuit court of appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be

filed by carriers shall "state separately the terminal charges and any rules or regulations which could in anywise change, affect, or determine any part of the aggregate of said aforesaid rates and fares and charges."

Inter. Com. Commis'n v. Chicago &c. R'd Co., 186 U. S. 320, 335.

The act to regulate commerce in section 6 provides that:

The schedules * * * shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

Industrial railroads not common carriers.—A railroad constructed and used merely in connection with the conduct of a private business is not a common carrier, so where a railroad is built to haul logs from the forest to the sawmill of the owner it is not a common carrier.

White v. Kennon, 83 Ga., 343; 9 S. E., 1082.

Wade v. Lutch & M. C. Lumb. Co., 74 Fed., 517.

Nicolette Lumb. Co. v. Peoples Coal Co., 26 Pa. Supr. Ct., 575.

Plant facility.—The circuit court of appeals, dealing with a provision of the State constitution which dealt with corporations of public improvement and utility, said:

We would not suppose that the learned counsel would seriously contend that article 244 of the State constitution, dealing with corporations of public improvement and public utility was intended to, or could be so construed as to, make out of a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for private purposes, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar mill, and used for carrying cane thereto, should be declared a common carrier.

In Louisiana it was held that a corporation organized to carry freight and passengers between two sugar plantations about five miles distant from one another, the sole object of which was to foster the private ends of two persons named, who owned jointly two sugar plantations, and who wished to transport sugar cane grown on one of the plantations to the refinery situated on the other, was not necessarily such a corporation for public improve-

ment as would authorize the appropriation of private property for its purpose.

Williams v. Judge of 18th Judicial Dist. Ct., 45 La. Ann., 1295; 14 So., 57.

Not common carrier.—A strictly private spur track leading from private property to the line of a public railroad over which the public can have no rights is not a common carrier. This was applied in Illinois to a tramroad running from one portion of a coal field to another. The court said:

It is clear the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works, and the present tramway are in the strictest sense private property, and the public generally have no more interest in them, or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character or the obligations of the company to the public in the slightest degree.

Sholl v. German Coal Co., 118 Ill., 427; 10 N. E., 199, 201.

In another case, where the company sought to condemn land for a track, the court said:

Stripped of all the disguises thrown around the case of the petitioner, it is shown that its object is to condemn the land of the defendants for the purpose of enabling it to

lay a siding, switch, branch road, or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, "of transporting freights to and from said steel works over the petitioner's said railroad." This clearly was for the private accommodation of both the railroad and steel-works, and to make the private business of both more profitable. This was not for a public, but was for a private, use, and the taking of the property, under these circumstances, would be the taking of private property for private use, which is clearly prohibited.

Pittsburg W. & K. R. R. v. Benwood Iron Works, 31 W. Va., 710; 8 S. E., 453, 467.

Montana case.—This case, often cited, is based upon a constitutional provision which provides that:

All railroads shall be public highways, and all railroads, transportation, and express companies shall be common carriers, and subject to legislative control, etc.

This provision is supplemented by a statute authorizing the construction of sidetracks, branches, etc., which made them instruments of public service. (*Butte A. & P. Ry. Co. v. U. Ry. Co.*, 16 Mont., 504; 41 Pac., 232 and 239.)

In the foregoing case the court, speaking through Hunt, Justice, said:

It is well established that if, in point of law, a use is public, the fact that not very

many persons will enjoy the use is not material. (*Talbot v. Hudson*, 16 Gray, 417.) The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. (*Phillips v. Watson*, 63 Iowa, 28; 18 N. W., 659; *Lewis, Em. Dom.*, p. 241; *Shaver v. Starrett*, 4 Ohio St. 496; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn., 461; 43 N. W., 469; *Rand. Em. Dom.*, 56.)

A common carrier may, as to a certain shipper, be a plant facility.—In *Crane Iron Works v. United States et al.*, No. 55, United States Commerce Court, in an opinion by the presiding judge, the question here involved was carefully considered. In that case the court said (*italics ours*):

In the operation of this plant it is necessary to transport loaded cars received by rail to various points within the limits of the plant for unloading, *to transport cars which have been loaded with its product from various points within the plant to the line of railway by which they are taken to destination, * * ** For these purposes the iron works long ago laid down rails extending from a connection with the Central Railroad to the various points within its plant where cars were to be placed * * *. The iron works also provided the necessary locomotives for operating the various tracks

which it had built to accommodate the needs of its plant. * * *

For this service the petitioner has never received and, until the organization of the Crane Railroad, had never claimed that it should receive compensation from the Central Railroad. Indeed, it seems to have been assumed that these tracks and engines were a necessary part of the plant of the iron works, whose business could not be properly carried on without them.

In process of time a few other industries, perhaps half a dozen, were located in close proximity to the premises of the iron works, though not upon its land, and these industries were so situated that loaded cars could be transported between the tracks of the Central Railroad and the industry only over the rails of the Crane Iron Works. For the purpose of serving these industries the Crane Iron Works extended its rails beyond its own land to these several plants. Cars for these industries were placed upon the same track with those intended for the iron works and taken by the locomotives of the iron works over the rails of that company to the several industries. * * *

The principal contention of petitioners appears to be that the Crane Railroad Company is a common carrier, subject to the provisions of the act to regulate commerce and the jurisdiction of the Commission; * * * that as such common carrier the Crane Railroad Company is legally entitled to compensation for the transportation service which it is alleged to perform for petitioner; * * *.

Quoting the statute, " The Commission may also, after hearing, * * * establish through routes and * * * joint rates * * *," the court further said:

Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad *was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works and, indeed, could not lawfully do so.* We see no reason to doubt the correctness of this conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Co. v. N. Y. C. & H. R. R. Co. et al.*, 14 I. C. C. Rep., 237; *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I. C. C. Rep., 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

In the transportation of supplies and employees of contractors, in connection with the construction of its own road, a railroad company does not act as a common carrier. It is a common carrier as to part of its traffic, but not such a carrier as to the traffic in which it is interested. (*Santa Fe Ry. v. Grant Bros.*, 228 U. S., 177.)

The definition and character of a railroad is determined by the purposes or objects for which it was constructed. (*I. C. C. v. B. & O. S. W. R. R. Co.*, 226 U. S., 14.)

A rebate.—This Court has stated that these allowances to tap lines from the lumber rates are rebates.

In *Illinois Central R. R. v. I. C. C.*, 206 U. S., 441, 444, the difference in the practice on the two sides of the river was explained in the following language:

The railroads west of the Mississippi make a certain allowance to the mills which have "logging roads"—that is, roads by which logs are hauled from the timber to the mills. This is called "tap-line allowance or division." * * * The mills east of the river have logging roads also, but appellants make no allowance to them. * * * There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, *and it amounts to a rebate* or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same.

Device.—The act to regulate commerce prohibits rebating in any form, directly or indirectly, “by any device whatever.” Construing this phrase in the *Armour Packing Company v. United States*, 209 U. S., 56, 71, 72, this court, speaking through Mr. Justice Day, said:

* * * And we find the word device disassociated from any such words as fraudulent conduct, scheme, or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be “that which is devised or formed by design; a contrivance; an invention; a project,” etc.

* * * * *

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and

posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

The latest case, and one bearing upon the lawfulness of an allowance for services in spotting cars on private side tracks, was decided in January last by the Supreme Court of New York, Schenectady trial term, opinion by Van Kirk, J. The court said:

I find that the 20 cents per ton is a reasonable charge for the work done and for which payment is claimed. The vital question, therefore, is whether or not this service is a part of the regular transportation service covered by the lawful, published freight rate. Is it a part of the service which the plaintiff is obliged to render as a common carrier of in and out freight? Is it service before delivery to the consignee and after acceptance from the consignor? If it is, the defendant's claim is lawful; if it is not, it is unlawful. (*Int. Com. Comm. v. Diffenbaugh*, 222 U. S., 42.) In order to answer this question it is necessary to determine where transportation begins and ends, where the delivering and receiving point is;

* * * * *

The general freight rate from point to point may not include an element for spotting (where it occasions appreciable expense), as such

actually results in an unjust charge to those for whom spotting is not done.

* * * * *

I find that the delivery on the storage tracks is a delivery to defendant; that the transportation begins and ends there; that plaintiffs published tariff includes no charge for service upon a "private siding"; that no transportation on a private siding further than to make clearance can be required from the carrier.

N. Y. C. & H. R. R. R. Co. v. General El. Co., 83, Misc. 539, 543, 544.

ARGUMENT.

The line haul, and moving cars upon a private siding, are independent and different services.

The line haul.—By an unbroken line of authorities, in England and in this country, it is established that, without statutory requirement, a carrier by railroad can not be compelled to perform services off its own line. But where private sidings are put in and used by shippers and consignees the carrier must receive carload traffic from, and deliver it to the private siding at the points of connection. The cars must be marshalled at the points of connection between the siding and the main line *by the shipper* so that they may be taken by the carriers' locomotives without operating upon the private siding, and the carrier makes delivery to the consignee by shunting the car upon the private siding *clear of the main track*. Some very large industries have, at the point of connection, "exchange tracks" and the cars

are marshaled upon these tracks by the shippers. The "transportation" or "conveyance" is between these points of connection; and this constitutes the line haul for which the line rate is charged.

Switching.—As the shipper must load and the consignee unload the cars, the cars must necessarily be moved upon the siding to and from the mills, warehouses, and plants of the shipper and consignee. The tracks are not public and this movement is not a "public" service. It is a private service for the shipper or consignee for whom it is performed. As the court said in *Chicago & A. Ry. Co. v. U. S.*, *supra*, referring to private sidings, "their only use was in getting a particular shipper's freight from his own property out to the public highway." When this switching service is performed by the line carrier it is paid for as a car movement and not upon a tonnage basis. Switching charges are always per car, while for a line haul there is a tonnage charge—so much per hundred or per ton for the car contents. Switching is as distinct and separate a service as icing or refrigeration or any of the other services mentioned in the statute and declared to be "transportation" for the purposes of the act. The purpose of the statute is regulation. It is intended that all services performed by a carrier subject to the act shall be brought under the regulatory power of the Commission. These charges are to be included in the published tariffs and thereby become "lawful" charges. In doing this Congress did not declare that such additional or special services should be per-

formed by the carrier as a part of the line haul for the line rate. On the contrary, the statute expressly provides that these services shall be, performed for compensation, and the Commission may be, and often is appealed to to determine whether such charges are reasonable.

We must conclude, therefore, from the authorities and the reading of the statute that the shipper has no right to demand that switching services be performed free of charge, but that the carrier has the right to make a separate charge appropriate and reasonable for this distinct service.

Discrimination.—It has been a common practice in this country for the carriers to absorb a switching service at some places and in special cases; to do the switching without making any charge therefor in addition to the line rate. The right of the carrier to do this is not questioned provided such *free service* does not work undue discrimination between shippers or localities. If this practice in any case gives an undue preference and advantage to a shipper the Commission, upon full hearing, may order the practice discontinued. The practice of absorbing switching services on private sidings is not universal. There are as many and perhaps more instances where a switching charge is published and collected. Some general principle or test must, therefore, be applied to determine whether performing a switching service on a private siding *free of charge* by a carrier is unduly discriminatory.

In *Wight v. United States*, *supra*, this court held that an accessorial service allowed to a single shipper was discriminatory because the service was not given to all shippers at that place.

We are not unmindful that this court has said that the law does not undertake to equalize the fortunes or conditions of man. Mere inequality of condition, therefore, does not create the undue discrimination or preference prohibited by the statute. But when the carrier performs for a shipper a service which is accessorial and thereby relieves that particular shipper of a burden which rests upon him, and does not perform the same service for other shippers at the same place, it is unlawful. This is not equalizing the conditions or fortunes of men; it is simply preventing preferences. To illustrate, two shippers in the same business, competing with each other, have warehouses located 2,000 feet from the line of a railroad; they deliver their carload traffic at the team track by drays at a cost of 50 cents per ton; the cost of loading a 30-ton car is \$15. The conditions, or fortunes, of these two shippers in this matter are precisely alike. Suppose now that one shipper puts in a siding, connecting his warehouse with the main tracks and the line carrier spots his cars at the warehouse and takes them loaded from the warehouse charging for the switching service \$5 per loaded car. Assuming this to be a reasonable charge and all that can be required, the conditions or fortunes of these two shippers are now disturbed. One is

still draying at a cost of \$15 per car and the other is delivering to the carrier at a cost of \$5 per car plus interest on his investment in the siding. The law does not undertake to equalize their condition by raising the switching charge. One shipper has put in a modern improvement that has reduced the cost of doing his business and he is entitled to that advantage. But suppose the carrier absorbs the switching service upon the siding, then, by an artificial, contractual relation voluntarily entered into by the carrier, the shipper is relieved entirely of the burden and expense of doing a part of his business—that of delivering his traffic to the carrier. This burden is assumed by the carrier. Clearly in such a case the carrier is giving an undue preference and advantage prohibited by the statute. As well might the carrier collect the \$5 switching charge and pay it back, as to perform the service without charge. It is no less a rebate when he performs the service free than it is when he pays back the money.

Again, the theory upon which the carrier is permitted to absorb a switching service is that the line rate is sufficient to cover the line haul and the switching. It must be observed, however, that if the line haul is sufficiently high to cover an additional service then it is too high to be charged to the shipper who does not receive the additional service. If the line rate is a reasonable charge for the line haul then the carrier is performing an additional service for which no remuneration is collected and the cost of that

service must be made up out of the public in some other way. In either view the practice of absorbing a switching service for one or more shippers having sidings where there are other shippers who do not have sidings but are compelled to deliver their traffic at their own expense to the team tracks, necessarily and inevitably works a discrimination. The only cases in which there is no discrimination are at points where all shippers have sidings and are served alike. But where some have sidings and others must deliver by drays, the only nondiscriminatory and equitable practice is to make the line rate reasonable for the line haul and make a reasonable charge for the additional service on private sidings. All shippers then pay the line rate and the shippers who receive the additional service on sidings compensate the carrier for it. Each shipper pays for what he gets.

A switching service can not be an integral part of a through route.

Section 1 of the act to regulate commerce requires common carriers subject to the act "to establish through routes and just and reasonable rates applicable thereto;" and to provide reasonable facilities for operating such through routes; "and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." If carriers subject to the act do

not comply with these requirements of the law the Commission may, after hearing, establish through routes and joint rates and prescribe the division of such rates, and the terms and conditions under which such through routes shall be operated. (Section 15.) Then follows this limitation:

And in establishing such through route, the Commission shall not require any company, without its consent, *to embrace in such route substantially less than the entire length of its railroad* and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which would otherwise be established.

The use of the term "through route" and the limitations put upon the Commission in establishing through routes show clearly that Congress had in mind only line hauls. A switching movement upon a private siding, at the point of origin or destination of freight, is not a part of a route. It is as above noted, *a service which precedes or follows* a line haul, and this is equally true whether the line haul be over a single railroad or over a through route composed of several lines.

The fact that private sidings and switches are included within the definition of "transportation" and "railroad" in the act, does not justify the claim that they may become an integral part of a through

route entitled to a division of the joint rate. Icing, storage, refrigeration, sleeping-car service, and other things are also included within the term "transportation," but no one would contend that a through route could be made out of a line haul and icing, sleeping-car, or any other of these incidental or additional services. In moving over a through route there is very much switching performed—the passing of trains, the transfer of cars from one railroad to another—but these services are incidental to and not the basis of the through route.

These tap lines, therefore, are not entitled to through routes, even if they be *bona fide* common carriers, when the service rendered is nothing more than switching cars of lumber from the mill to the main line. It is not transportation, using that word in the sense of conveyance or line haul; it is bringing the freight to the public highway or line carrier. It can not, therefore, be a segment in a through route.

Here it may be well to observe the difference between the words "allowance" and "division," as used in the statute. The former applies to allowances made to a shipper under section 15 for services which the carrier can be compelled to perform, but which he allows the shipper to perform. The word "division" applies only in cases of through routes, to the portions of the joint rate which each line carrier receives. If the services performed by a shipper is a switching service, the allowance will be a switching charge, that is, a charge per car, and such allowances have been made to tap lines. They

complain of this and say they want a "division." The reason for this is apparent. A switching charge would be from \$1.50 to \$5 per car. The divisions which have been improperly allowed by carriers were on the theory that a switching movement was a part of the through route, and "divisions" were made ranging from 2 to 4 cents per 100 pounds, making the "allowance" to the shipper or its tap line \$12 to \$18 and \$20 per car. Of course, they want "divisions." But the character of the service must always determine the compensation. If the service is switching the allowance will be a switching charge; if it be a line haul over part of a through route there will be a "division" of the joint rate.

Spurs and branch lines.—This court, construing the phrase "lateral branch line of railroad, or private side track," in our act, said:

They are dependent upon and incident to the main line—feeders such as may be built from mines or forests to bring coal, ore, and lumber to the main line for shipment. *U. S. v. B. & O. S. W. Ry., supra.*

From this and other authorities cited spurs and branch lines are longer than a switch, but like the switch are intended to reach a shipper's warehouse or place of business or to accommodate a group of shippers. They furnish a cheap and expeditious means for making *the shipper's delivery*. The service is special and precedes the main line haul; in quality it is precisely the same as the service performed upon a switch; it is *getting the shipper's traffic*

to the main line; it is an additional service to the main-line haul; it is not a part of a through route and is not covered by the line rate. What we have said, therefore, in reference to the operation of a switch by a carrier applies with equal force to services performed by a carrier upon a spur or a branch-line railroad, the only difference being that the compensation for services upon spurs and branch lines is usually computed upon tonnage, while the compensation for services performed upon a switch is a charge per car. This difference in the mode of arriving at charges does not modify or affect the general principle here discussed as to its relation to the line haul.

II.

Transportation of logs.

Logs are the raw material out of which lumber and other forest products are manufactured. Their relation to lumber is the same as the relation of wheat to flour, iron ore to steel. In all tariffs and classifications logs are recognized as a distinct commodity, the rates upon which are fixed with reference to value, loading, and the distance transported. The cost of milling lumber or other like products involves the cost of the logs at the mill, and this necessarily involves the cost of transporting them there. A sawmill is usually located upon a line railroad and has a switch connection for the delivery of carload lumber. If the forest is near, the logs are hauled by team. As the timber is

cut away the log haul increases, and logging roads of various types are put in to reduce the cost of transporting the logs from the forest. Whether the mill transports its logs from an immediate territory or buys them on the Pacific coast and has them shipped a long distance, the cost of the transportation in either case and in all cases is a part of the cost of the logs at the mill. Any practice, therefore, by line carriers which relieves the mill owner of the reasonable charge for the transportation of logs is a *direct contribution to his net operating revenue*. There is no more reason or right for a common carrier to contribute to the mill owner the cost of transporting logs than there would be in contributing the logs themselves, or furnishing the mill owner with forests free from which he might cut his timber. In either case the carrier would be making a direct contribution to the net operating revenues of the mill owner, and the purpose in making such a contribution would be to get the lumber traffic. There is no difference in principle between buying the lumber traffic by giving a free service and buying the traffic with money or a cash rebate from the published rate.

Any practice by a carrier which results in contributing to a mill owner the cost of transporting his logs, or any part of the fair charge for transporting them, to secure his lumber traffic, is unlawful, and a violation to the statute.

III.

The milling-in-transit privilege as practiced by tap lines.

The evidence in this case shows two practices. The first is the more general. It consists of the tap line filing with the Commission a logging rate with a milling-in-transit privilege, then arranging with the line carrier for a "division" of the lumber rate, and applying the lumber rate to a tap line "station" at the forest where the logs originate. The line carriers put in a blanket rate on lumber, which applies to every station in this territory, covering parts of three States of the Union, with a concurrence in milling privileges established by "connecting carriers." They then established through routes and joint rates over their own lines and the tap lines. The "joint rate" being the blanket lumber rate, the result of this arrangement is, that when the logs are milled into lumber at the mill, the blanket lumber rate is extended to the terminal of the tap line at the forest; the tap line is given a division of the blanket lumber rate, and the charge for the log haul is *entirely obliterated*. By this method a mill owner secures the transportation of the logs from the forest to his mill without paying anything for the transportation. The allowance which he receives from the line carrier out of the lumber rate pays the entire cost, and often more, of the transportation of the logs from the forest to the mill.

This tap line milling-in-transit differs radically from the milling-in-transit upon main-line railroads. The tariffs of the Chicago, Rock Island & Pacific Railway, Kansas City Southern Railway, Missouri Pacific Railway and other main lines give milling-in-transit privileges upon logs. The logs are charged a high rate, often a penalty rate, from the forest to the mill. After they are milled, if the lumber is shipped out over the same line, the lumber rate is charged in full and the log rate into the mill is reduced, but still remains a substantial charge. Take the instance given by our Division of Tariffs upon the Rock Island road, which is typical of the practice by line carriers. There are two stations, Moreland and Ruston, in the State of Louisiana. They are 99 miles apart. The blanket lumber rate into Memphis, Tenn., from both these points is 14 cents; there are two rates published on logs from Moreland to Ruston; one is 11 cents, called the "Billing rate," the other is $3\frac{1}{2}$ cents, called the "Net rate." If the logs are hauled into Ruston by the Rock Island and the lumber is transported over the Rock Island lines from Ruston to Memphis, the total charge is $17\frac{1}{2}$ cents—the full lumber charge of 14 cents from Ruston and a $3\frac{1}{2}$ -cent charge for the log haul from Moreland to Ruston. Now, if we take a tap line extending 99 miles from Ruston to a station called "Tap Line," the application of the tap line billing practice would be to extend the 14-cent lumber rate back to "Tap Line." The result would be that a mill owner at Ruston owning a forest or purchasing his

logs at Moreland would pay for his log and lumber haul $17\frac{1}{2}$ cents, while a mill owner at Moreland, having a forest at "Tap Line" and being the proprietary owner of the tap-line railroad, would pay 14 cents for his total log and lumber haul, thus creating a very great discrimination and preference in favor of the mill owner having the tap line.

To meet this objection, so apparent and manifest, some of the tap lines that have so-called independent mills upon their lines have put in a small charge for the log haul, which they collect from the independent miller and also make a book charge against the proprietary company for the hauling of logs. This charge in one case, which is the highest made, is $1\frac{1}{2}$ cents. This rate is published, *but it is no part of the through rate.* It is an *intrastate rate.* The tap line secures a division of the lumber rates on its milling-in-transit privilege, without regard to the fact that it is collecting $1\frac{1}{2}$ cents from the independent mill. This log charge the tap line collects without accounting for it upon the joint through-route rate. This furnishes a weak argument to meet the objections of the former case.

The so-called independent mill is usually a sort of by-product for the proprietary mill. These independent mills do not manufacture the same kind of lumber manufactured by the proprietary mill, or do not, for other reasons, compete with the proprietary mill owning the tap line. An independent mill owner is allowed to establish his mill upon the tap line a few miles from the main-line railroad. He gets his mill

site from the tap line mill owner; he buys his timber from him; the proprietary mill owner's tap line hauls the logs to the mill and makes a small charge for the haul. The tap line then arranges with the main-line railroad for a through route, and as the originating carrier secures a large division of the blanket lumber rate, 2 to 4 cents per 100 pounds. The independent mill therefore becomes a by-product to the proprietary lumber company. We do not say that there is anything unlawful in the proprietary mill's arrangement with the independent mill; but we do say that the whole arrangement, when properly viewed in connection with the dominant traffic of the tap line owner, is a device for securing divisions out of the main-line lumber rates for services which are only a shipper's delivery over a spur track. The delivery of the lumber from the proprietary mill over the switch to the main-line railroad is a shipper's delivery of his traffic. The public should not be charged for performing this service, for we must bear in mind always, as stated by the Commission in the terminal case, that where a substantial benefit is given by a carrier to a shipper by way of allowances out of main-line rates, a loss results that is made up by charges upon other traffic, and in that way the public bears the burden.

This practice of absorbing the log haul is a bald, open contribution to the mill owner.

The so-called milling-in-transit privilege, as practiced by the tap lines, results in free log hauls and is unlawful. Any practice by which the line carrier

assumes the burden of transporting logs for a mill owner is a rebate, the purpose of which is to buy the mill owner's lumber traffic.

IV.

Matters claimed by the tap lines as bases for through routes and divisions of the main-line lumber rate.

Incorporation.—The act to regulate commerce makes no distinction, in the application of the provisions of the act, between corporations or persons. The privileges of, and prohibitions upon, practices in transportation apply alike to incorporated companies and carriers that are not incorporated. A group of men may carry on a business of transportation; at a later time they may incorporate that business and issue the stock to themselves; this change in the ownership and operation does not confer any additional rights or subject them to any additional or different obligations or penalties. The mere act of incorporating a logging railroad or tap line does not confer, in itself, any special privileges.

Common-carrier tap lines.—After the passage of the Elkins Act, a great number of logging roads were incorporated under State statutes as common carriers. These statutes are general incorporation acts, under which a specified number of persons may become incorporated for any purpose stated by them in their application.

While in most cases this confers upon the corporation certain rights and, when they offer to carry property for other persons, may constitute them common

carriers as to such traffic, it does not prevent an inquiry into the whole matter to determine whether they are *bona fide* common carriers as to all traffic. The power to investigate and determine whether such incorporation and incidental common carriage is assumed as a device for the purpose of evading the Federal law and securing rebates or unlawful discriminations or preferences upon the traffic of the proprietary owners, can not be defeated by this arrangement.

Prior to the enactment of the "commodities clause" and the conference of power upon the Commission to determine whether or not rates and practices by railroads are unlawful and to prescribe reasonable rates and practices for the future, this court held that a practice by two line carriers which resulted in a violation of the Federal act prohibiting discrimination in transportation rates could be enjoined; that the court could look through the forms adopted by the carriers—the business in itself then being otherwise legitimate—to ascertain whether *in fact* it resulted in a violation of the act to regulate commerce. (*New Haven R. R. Co. v. Interstate Com. Com.*, 200 U. S., 361.) The power which the court in that case exercised has since been vested in this Commission. The Commission may now investigate the form and method of carrying on interstate transportation business, and if after full hearing it is of the opinion that any "practices whatsoever" are "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any

of the provisions of this act," it may prescribe what "practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, * * *." (Section 15.) If the practice by line carriers could be investigated by the court prior to the act of 1906 and, if found to be in violation of the act, be prohibited, certainly since the act of 1906 a practice by a line carrier in connection with a tap line may be investigated by the Commission, and if found to be unlawful it may be prohibited. Common carriage of a small outside traffic, by the tap line, can not defeat this power.

Common carriers as to part.—In the *Crane Iron Works* case, the Commerce Court said:

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers.

The fact that these tap lines have been incorporated by proprietary mill owners, and may be regarded as common carriers as to some outside traffic, does not prevent the Commission from finding, if it be true, that as to the traffic of the proprietary mill they are a plant facility performing a plant service. (*A., T. & S. F. Ry. v. Grant Bros.*, 228 U. S., 177.) Nor does it follow that because they transport lumber for an outside party over what is practically a spur track, that such transportation is anything more than a shipper's delivery to a main-line carrier.

A railroad originally organized as a tap line may develop into and become a line carrier; when it does, the Commission will so recognize it. Each particular case must be decided upon the character of its particular traffic. It is *the character of the transportation service*, rather than the character of the agent, which determines whether the agent is entitled to through routes and joint rates.

Device.—The act to regulate commerce prohibits rebating, directly or indirectly, “by any device whatever.” Construing this phrase in a criminal proceeding, this court, speaking through Mr. Justice Day, said:

* * * the act seeks to reach all means⁵ and methods by which the unlawful preference or rebate, concession, or discrimination is offered, granted, given, or received * * *. A device need not be necessarily fraudulent, the term includes anything which is a plan or contrivance * * *. It is not so much the particular form by which, or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions or rebates from the fixed rates duly posted and published. (*Armour Packing Co. v. United States, supra.*)

In the case at bar the Commerce Court recognized the power of the Commission to investigate and determine whether or not a tap line was a *bona fide* common carrier. It said:

The evidence before the Commission tending to show that the petitioning tap lines were

originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, *might have justified the Commission in finding that these tap lines were not in fact bona fide common carriers.* (Rec. 190.)

The Commission therefore has power, and it is its duty, being charged with the enforcement of the provisions of the act to regulate commerce, to investigate and determine whether a particular tap line is, in fact, a *bona fide common carrier as to all of its traffic*; to ascertain what the nature of the transportation service performed by the tap line is, and from all the evidence determine whether the organization, the methods of doing the business, and the transportation service carried on, is in fact a device to secure rebates and concessions from the published rates. If, upon such investigation, it is found that such was, and is the purpose of the organization and practices, it becomes

the duty of the Commission to prohibit the line carriers from establishing through routes and joint rates that result in such rebating and discrimination.

General observations.—The investigation in this case has developed a widespread commingling of the business of transportation with private business. The aggregate amount of the allowances out of main line lumber rates is enormous. It reduces legitimate railroad revenues by an insidious system of rebating. The purpose in this case is to separate the public business from private business; to insure to public line carriers reasonable compensation for every substantial service that they render; to place upon each shipper the duty of paying the reasonable charges for the services which he receives; to prevent private enterprises from casting upon the public, through the common carrier service, a part of the burden of doing their private business. Each shipper should perform its interplant service, and deliver its traffic to the line carriers.

This requires the separation of the charges for the line haul from switching charges where absorption of the switching service is not permissible. It is within the power of the Commission to require that this shall be done.

After holding that icing is a transportation service under the statute, this court, speaking through Mr. Justice Lamar, said:

It [the Commission] may prescribe the form in which schedules shall be prepared and arranged (section 6) and may approve tariffs

stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those orders are void.

Atchison, Topeka & Santa Fe Ry. Co. v. United States et al. Opinion filed January 26, 1914.

V.

THE BUTLER COUNTY RAILROAD COMPANY.

There are two corporations whose entire stock is owned by the American Sugar Refining Co., of New York: (1) The Great Western Land Co. and (2) the Brooklyn Cooperage Co. The Brooklyn Cooperage Co. owns all of the stock of the Butler County Railroad Co. The Sugar Refining Co. therefore owns and controls all three of these corporations and is the sole beneficiary of their business operations.

The Land Co. owns very large tracts of timber in the State of Missouri. The Brooklyn Cooperage Co. operates a large mill at what is known as Poplar Bluff or Linstead, Mo. It manufactures sugar barrels or cooperage stock for the American Sugar Refining Co. The mill is connected by a switch with the St. Louis, Iron Mountain & Southern Ry. and the St. Louis & San Francisco Railroad. The logs or timber from which this cooperage stock is manufactured comes from the forests owned by the Great Western Land Co., and the logs are transported from the forests to the mill by the Butler County Railroad. The cooperage stock is switched from the mill to the main tracks of the line railroads, a distance of about three-quarters of a mile. There are other mills located on these switch tracks. The railroad, the mills, and connections are shown upon a map attached to this brief. The American Sugar Refining Co. has its refineries in New York and New Orleans, and the shipments of its

lumber are over the main line railroads from the cooperage company's and other mills.

The tap line railroad is in two disconnected sections; one connects with the Iron Mountain and "Frisco" Railroads at a point known as Linstead, which is outside the limits of the town of Poplar Bluff, Mo. The mill of the cooperage company is located at Linstead. At this point there are only the switches or private sidings connecting with the main-line railroads. The other section of the tap line connects with the Iron Mountain Railroad at Lowell Junction, about $7\frac{1}{2}$ miles from Linstead; it runs thence southward about 7 miles to a point known as Baileys, with a branch about 3 miles in length at Rossville. At Baileys connection is made with, and a trackage right is given over, the unincorporated tracks of the cooperage company that run into the timber tracts owned by the land company to Menorkenut. The cooperage company has other logging roads into the forests. The tap line has a trackage privilege over the Iron Mountain Railroad from Lowell Junction to Linstead. For this trackage right it pays only 65 cents per train-mile for a train of 25 cars. The equipment consists of 2 locomotives, 2 passenger coaches, 3 cabooses, and about 100 freight and log cars. It operates over about 34 miles of rails, of which it owns 12 miles.

Prior to September, 1905, this entire railroad was constructed and operated, with the main-line trackage right, by the cooperage company as a logging road.

Aside from rebates from the published rates, no formal divisions of joint rates or allowances for plant services were paid by the line carriers. In September, 1905, preceding the passage of the Elkins Act, the logging roads, except those extending directly into the timber tracts, were conveyed to the newly organized Butler County Railroad. The stations named were established as the forest termini of the road. Beyond these points into the forests the logging roads were still retained and operated by the cooperage company. This is the common practice in all the tap-line cases. The logging roads into the forests are not made common carriers for the reason that if they were, the owners of segregated tracts of timberland could ship their logs over them. The great lumber companies prefer to hold a monopoly over the forests and thereby compel the sale of outside tracts to them as they need them. Through these two manipulations the large lumber companies seek (1) to monopolize the forests, and (2) to secure, through the medium of through routes and joint rates and the milling-in-transit privilege, rebates from the published lumber rates.

The timber is loaded on the cars in the forest by the employees of the cooperage company and hauled by the mill locomotives to the tap line. The tap line then hauls the loaded cars over its rails to Lowell Junction, thence over the Iron Mountain Railroad to the mill of the cooperage company at Linstead. The cooperage company unloads the logs, manufactures the lumber,

and loads the manufactured products upon cars, and the tap-line engine switches the cars to the trunk lines. Before the tap line was organized this switching was done by the trunk lines.

The cooperage company owns certain tracts of land lying between the main-line railroads and the lands belonging to the land company. As the cooperage company manufactures only cooperage stock it has leased certain mill sites to "independent" industries; these are located on the tap line switches near Linstead. The independent industries lease their factory sites from the cooperage company, purchase their timber from the Great Western Land Co., and the Butler County Railroad Co. hauls the logs to their mills, and switches the products of the mills to the main lines of railroad. The tap line charges the independent mill 1 to 1½ cents per 100 pounds, \$4 to \$6 per car, for hauling the logs to the mill. And they make a like book charge against the cooperage company for hauling logs to its mill. These rates on logs are fixed in accordance with the distance tariff of the State of Missouri, the haul being an intrastate movement. No charge is made to the independent mill for switching its lumber to the main-line railroad.

The Butler County Railroad up to the time of the hearing in this case had been receiving a division of the blanket rate on lumber—proprietary and nonproprietary—ranging from 3 to 5 cents per 100 pounds—60 cents to \$1 per ton. This, on earloads of 25 tons each, would be \$15 to \$25 per car. In some instances the allowance was greater.

This division of the through rate was made upon the theory of a milling-in-transit privilege. The Butler County Railroad Co. put in a tap-line milling-in-transit privilege, which in effect sets the lumber rate back to the tap-line stations at the forest and thereby absorbs or obliterates entirely any charge to the cooperage company for the log haul. The independent mills receive no benefits from the arrangement. It is not a rebate as to them. This company collects from the independent mills from \$4 to \$6 per car for hauling logs, but this is no part of, nor is it taken into consideration in fixing the divisions of the joint rate over the through route. It is an entirely independent intrastate charge collected by the Butler County Railroad Co. It has no reference to, or connection with the line rate. Of course the mere book charge of this local intrastate log rate to the cooperage company is no source of income to the American Sugar Refining Co. as owner. If they paid it in cash it would go from one pocket to another. The charge to the independent mill is a recognition of the fact that a mill owner ought to pay for hauling his logs, and they require the independent mill owner to do this. But when it comes to the "division" of the through lumber rate with the main-line railroads, and its application to the so-called milling-in-transit privilege, these log charges do not figure. The "division" is just the same on the independent mill traffic as it is on the cooperage company's; but, as the ownership of the tap line and the proprietary traffic is one and the same, the payment of a "division" on this traffic is,

in fact, a *payment to the shipper*. It is a plain, unequivocal absorption of the log haul of the cooperage company by the payment of a very large rebate.

The distance tariff of the State of Missouri on logs, applied on these log hauls for the independent mill, amounts to from \$4 to \$6 per car. The divisions of the published lumber rate, covering this same log haul and a switching movement at the mill, amounts to \$15 to \$25 per car.

The independent shippers pay the local log rates on the tap line, in addition to the charge of the trunk line on their lumber, and receive no benefits from the division of the lumber rates.

The power of monopoly is here also asserted. If the independent shipper ships to points *other than New York or New Orleans*, where the American Sugar Refinery Co.'s plants are located, they pay a through rate that is 2 cents higher than the rate from Poplar Bluff on the main line, the 2 cents being paid on outgoing freight. Regarding this practice the Commission says:

This is a striking example of the advantage that an industry can get out of a tap line that it owns and holds out as a common carrier. The sugar company, as is well known, has important refining establishments at New Orleans and New York, and it is to its interests to have all the hardwood along the Butler County Railroad made available to it. The rates to New York and New Orleans are, therefore, so adjusted as to induce movements to these points and to restrict movements to other points.

VI.

THE ISSUES.

The Butler County Railroad is placed in the third list of tap lines in the Commission's order and it results, so far as the Butler County Railroad is concerned, in allowing through routes and divisions of joint rates—upon divisions to be approved by the Commission—on nonproprietary traffic where the shippers receive no benefits from the divisions. In fixing the divisions the Commission will take into account the log rate. The switching of this traffic from the mill is covered by the through rate. A switching allowance is permitted for switching the proprietary lumber from the mill to the main-line tracks. This is allowed because the main-line railroads in that entire territory absorb the switching service and, as discussed in our other tap-line brief, where an absorption of a switching service is general as to all shippers, then if the company allows a particular shipper to do the switching it may make a reasonable allowance to such shipper for that service. The allowance in this case was fixed at not to exceed \$1.50 per car. Divisions on the proprietary traffic was refused because it results in direct benefit, and payments to the shipper—the American Sugar Refining Co.

DECISION OF THE COMMERCE COURT.

The Commerce Court held:

For the reasons stated in the opinion filed this day in cases No. 90 to 93 we are of the opinion that the distinctions here made are

arbitrary and that the order is, in this respect, beyond the power of the Commission.

When the Commission permits the reestablishment of a joint rate which was applicable both to the logs and the lumber, including the milling-in-transit privilege, thereby recognizing the tap line as a common carrier both of logs and lumber, it is without power to forbid the payment by the trunk line to the tap line of a reasonable division for its services both in hauling the logs to a mill, proprietary or nonproprietary, and in hauling or switching the lumber from such a mill to a trunk line. It is in such case equally without power to limit the payment in respect to the traffic of the proprietary mill to a mere allowance for switching the lumber. The proviso contained in paragraph numbered 9 of the order must, therefore, be annulled.

If the divisions theretofore in force were so excessive as to produce an unjust discrimination, or to amount to a secret rebate, the Commission may reduce them to a reasonable sum, and nothing herein stated is intended in any manner to limit the power of the Commission in this respect.

Bearing in mind that the services which are performed by the Butler County Railroad Co. for these divisions, amounting to from \$15 to \$25 per car, are (1) switching the lumber from the mill to the main tracks, and (2) hauling logs from the forest to the mill of the cooperage company, under an unlawful milling-in-transit privilege, the errors in the decision of the Commerce Court are apparent.

Switching.—We have already discussed this subject at length and need not here repeat it. Switching is no part of a line haul and therefore does not entitle the tap line to a “division” out of the line rate. It is a service which the carrier may be required to perform *under the terms of the statute*; if the carrier permits this shipper to perform this service, and absorbs the service as to all other shippers in like condition, it is proper to make an allowance of a purely switching charge. It can only be the reasonable charge fixed by carriers for a switching service. There is no claim by the Commerce Court that there was no evidence to support the finding of the Commission that an allowance of \$1.5 for the switching service was reasonable. In fact, that question could not be raised in this case in the Commerce Court, as the whole record before the Commission was not presented. The evidence, therefore, as to the amount of the allowances at other points for similar service does not appear in this record. It was expressly stipulated that there was evidence showing switching charges ranging from \$1.50 to \$2. (Rec., p. 75, sec. 1.)

No question, therefore, can be raised here that the amount of the allowance is not supported by substantial evidence.

Log haul.—As already set forth in our brief a milling-in-transit privilege which eliminates entirely any charge for the log haul is illegal and unlawful. It is an absorption of a service which the mill owner must pay, not by any theoretical bookkeeping *but in*

fact. The Commission found in this case that the result of this milling-in-transit privilege was to lift entirely the burden of hauling logs from the mill owner who owned and operated the tap line. Book-keeping is an easy and inexpensive process. When the mill owner operates his own logging road and receives a rebate of \$15 to \$25 per car from the published rate he is subject to fine and imprisonment under the Elkins Act. The appellee would have us believe that by organizing a tap line and holding all the stock, the tap line can take the \$15 or \$25 per car and distribute it in dividends to the mill owner without violating the law. If no dividends are paid, the payment of the "divisions" pays the tap line for hauling the logs for *its owner*; its owner being also the mill owner, and the shipper. If a line carrier, in order to get the lumber haul, should baldly offer to carry the logs from the forest to the mill for the mill owner, this would be buying the traffic and a clear violation of the law. But if the mill owner organizes a tap line and holds all the stock himself, puts in a milling-in-transit privilege which extends the lumber rate back to the tree and thereby obliterates any charge to the owner for the log haul, this they would have us understand is legitimate business. And the Commerce Court seems to have taken this view when it annulled that part of the order of the Commission which prohibits "a reasonable division for its services *both in hauling the logs to the mill*
 * * * *and in hauling or switching the lumber from such a mill to a trunk line.*

If the doctrine laid down in the *New York & New Haven case* is to prevail, then the Commission under the amendatory acts of Congress has the same power which the court exercised in that case. The Commission may look through the forms, agreements and methods of doing the business and ascertain whether there is in fact a violation of the act to regulate commerce; whether the organization and processes are a device to secure rebates to the shipper; whether such arrangements and conduct of business result in undue discriminations and preferences in favor of the proprietary company, the only real party in interest. If such results do necessarily follow, then the Commission has the power, asserted by the court in the *New Haven case*, to prohibit such acts as do result in a violation of the statute.

The holdings of the American Sugar Refining Co. is one single interest—a person, and that person is the mill owner and the shipper of the lumber who pays the freight. The result of the payment of divisions on this proprietary traffic must be clearly distinguished from the result of like payments on the nonproprietary traffic; in the first instance it is a direct payment to the shipper, in the latter it is not; in the first, the cost of the log haul is absorbed in the lumber rate, in the latter it is not; in the former the shipper gets his logs hauled from his forest to the mill free, in the latter the shipper pays for the hauling of his logs; in the former the shipper gets a large concession from the lumber rate, in the latter they pay the full lumber rate. Upon these distinctions rest the necessity, and the right, to determine that

as to proprietary traffic the service is a plant facility, while as to the nonproprietary it may be the service of a common carrier.

No one can study this case with care and discrimination without being led to the conclusion reached by the commission. These practices are a clear violation of the law. The Commerce Court was compelled to say in its main opinion "*it is apparent therefrom that very real evils existed, evils demanding correction.*" What were they if not the very things the commission condemns?

It is beside the mark to say that the tribunal to enforce the law, possessed of all the powers enumerated in the statute and clearly stated in the opinions of this court, can not reach and eradicate these evils because a tap line is holding itself out to do common carriage business for outside shippers. This would have defeated the order in the *Crane Iron Works case*. The law can not be so impotent. In the *Armour Packing Company case*, which was a criminal proceeding, this court clearly held that an act, even if lawful when made, could become unlawful under the statute and the keeping of it a criminal offense. It would be strange under this strong virile opinion if these ill-conceived and ill-covered practices to secure rebates can not be reached and prohibited by the orders of the Commission.

In the New Haven case this court used the following language, which we think particularly pertinent in this case:

* * * This simply asserts the proposition which we have disposed of, that a carrier pos-

sesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute (p. 396).

* * * * *

* * * the commingled powers of producing, selling, and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded (p. 400).

* * * * *

Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight and was not lightly to be interfered with (p. 402).

As no other questions of law are raised in this case, or decided by the Commerce Court, we ask that the decision of the Commerce Court be reversed.

Respectfully submitted.

JOSEPH W. FOLK,

CHARLES W. NEEDHAM,

Counsel, Interstate Commerce Commission.

Tap Line Cases.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 829.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,
v.

LOUISIANA & PACIFIC RAILWAY COMPANY ET AL.,
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ET AL., APPELLEES.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel.

Supreme Court, U.

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BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

QUESTIONS OF LAW.

In view of the holding of the Commerce Court that switching on private sidings and spur tracks, and log

hauls with milling-in-transit privileges, may be integral parts of through routes covered by the line rate upon lumber, we present for consideration the following propositions:

1. A switching service on a private siding or spur track is a service which precedes or follows a line haul; it is the shipper's delivery to, or the consignee's receipt from, the line carrier; it is not a line service, therefore it can not be the basis of, or a link in a through route.

2. Logs and lumber are distinct commodities, for each of which there is a classification and commodity rate; the cost of transporting logs is a part of the cost of the logs at the sawmill; therefore a log haul performed by a carrier *free of charge* is a consideration to induce the mill owner to give the carrier his lumber traffic at the published lumber rate; such absorption of a distinct service by a carrier is rebating or "buying the traffic."

3. A milling-in-transit privilege which extends the lumber rate, for the lumber line haul, back to the forest and thereby absorbs or obliterates any charge for the log-haul, is not a true milling-in-transit privilege and is unlawful.

4. A tap line or industrial road may be so owned, organized, and conducted as to be a plant facility as to the traffic of the proprietary company and a common carrier as to non-proprietary traffic.

5. It is within the powers of the Interstate Commerce Commission, upon full hearing, to determine:

(a) That the practice in a given case of absorbing switching, spur track, and log-haul services in order to secure the shipper's lumber traffic creates undue discrimination, favoritism, and rebating.

(b) That a milling-in-transit privilege which has the purpose and effect of rendering to the shipper a free service in transporting raw material for him, in order to secure the shipper's traffic of manufactured commodities, is unlawful.

(c) That a tap line or industrial road is a plant facility as to the traffic of the proprietary mill, while it may be a common carrier as to non-proprietary traffic.

I.

A switching service upon a private siding or spur track is an independent service which precedes or follows a line haul.

Matters to be excluded.—The discussion under this head has reference solely to the movement of cars between the private warehouse or place of business of a shipper and the point on the private siding (free of the line tracks) where connection is made with the main line. We have no reference to the carrier's delivery in shunting cars upon the private sidings free of the main track, or switching between line carriers in a through route, or deliveries upon public team tracks. We contend that the movement of cars upon private sidings is a shipper's service, tak-

ing the place of, and being a substitute for, the truck or team delivery by shippers generally.

Loading and unloading carload traffic.—It is the universal practice for shippers and consignees to load and unload carload shipments. The carrier receives the car loaded from the shipper and delivers it loaded to the consignee. The line haul for which a line rate is charged is between the points of such receipt and delivery by the carrier. All services outside the line haul are additional services for which the carrier may properly claim additional compensation.

Absorption.—We do not contend that a carrier may not absorb this additional service where it does not work undue discrimination or operate as a rebate. This court and the commission have held that a switching service may be performed without extra charge; that is, may be absorbed by the line carrier. Our contention is that a shipper having a private siding, has no right to have this additional service absorbed, and that the commission may prohibit it where such absorption operates as an undue discrimination against shippers of like traffic who are obliged to deliver their traffic upon public or team tracks. The phrase "*absorbing the service*" means, as it is interchangeable with the term, "*free service*."

Switching and interplant service.—Before the extension of the definition of the word "transportation," by the act to regulate commerce, the word, as used at common law, was equivalent to what is now termed the line haul. Transportation, when carried on by a common carrier by railroad, was the business

of receiving traffic from shippers at designated points on the rail-line and delivering the same to consignees at other designated points on the line. It was the shipper's business to bring his traffic to the carriers at the points of receipt, and of the consignee's to take it away from the points of delivery. In the case of overland freight the delivery by the shipper included the loading and the consignee unloaded the freight.

Switching and its relation to the transportation was clearly defined by the Supreme Court of Georgia.

The test of distinction between "transportation" service, relative to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" services, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned. (*Syllabus*.)

Dixon v. Central of Georgia Ry. Co. (110 Ga., 173, 35 S. E., 369, 372).

Statutory definition—In 1904 the English statute was adopted requiring carriers, for the accommodation of shippers, upon certain conditions, to con-

neet with private sidings and to operate them. But, as we shall see from a clear line of authorities, the distinction theretofore prevailing, that this was *additional service* for which compensation could be required, was recognized.

Our act to regulate commerce, as amended June 29, 1906, provides that:

The term "railroad" as used in this act shall include * * * all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, * * * and the term "transportation" shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit * * * and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. * * *

Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and *operate upon reasonable terms* a switch connection with any such lateral, branch line of railroad, or *private side track* which may be constructed to connect with its railroad, where such connection is reasonably prac-

licable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same (Sec. 1).

When the carrier refuses to furnish these facilities the commission is authorized to require the same "and shall determine as to the * * * *reasonable compensation* therefor * * *."

Additional compensation.—The words above quoted, "and operate upon reasonable terms a switch connection," etc., when considered in connection with the debates in Congress, should, we think, be construed to mean that the carrier may be required to operate the cars upon a switch. This construction arises in consequence of the fact that private sidings are in many cases for the accommodation of shippers who have no locomotives with which to move cars upon the switch or spur.

The use of the words "upon reasonable terms" and "reasonable compensation therefor" is a clear recognition that the services performed upon the switch in operating the cars is a service additional to the line haul. It is not a part of the delivery which the carrier is required to make of carload freight. Prior to these enactments the carrier could not be compelled to operate a switch; it was not a part of the transportation; delivery of car lots was made by shunting the car upon the private switch clear of the main track; the "spotting" was additional service performed voluntarily, usually under contract. The statutes both in England and in the United States

recognize it as additional or extra service by providing that carriers may be compelled to put in and operate switches only upon the payment of reasonable compensation therefor.

Lateral line.—This is true as to spurs and lateral lines. Such lines are longer than a "switch," put in to reach a warehouse, mill, coal mine, or forest. The same general designation appears in the English statute—"private sidings or private branch railways." The phrase "lateral branch" in the act to regulate commerce has been construed by this court to mean lines "that are dependent upon and incident to the main line—feeders such as may be built from mines or forests to bring coal, ore, and lumber to the main line for shipment. * * * That some shippers would be accommodated by a switch connection is not enough." (*United States v. B. & O. Southwestern Ry.*, 226 U. S., 14, 19.)

Whatever the legal construction of the word "operate" may finally be, there is a clear recognition that the services upon a switch, spur, or lateral branch line of road are services additional to the main-line haul and are not included in it. The "line haul," as it is always defined, includes the taking of a car from the team track or from the junction point of a private siding and conveying it to the point of destination and delivering it either upon the team track or upon the private siding clear of the main track.

The following English and American authorities state the law upon this subject. The doctrines established by these authorities will be discussed after the citations are given. Our act is similar to the English statutes and their courts have decided the question under consideration here.

ENGLISH AUTHORITIES.

Fourth Edward VII, chapter 19, provides that an abutting property owner is entitled to a siding connection with the railway, and section 2 of the Railway and Canal Traffic Act of 1854 provided that a trader is entitled to all reasonable facilities, etc. This language is defined in the statute first above referred to as follows:

The reasonable facilities which every railway company is required to afford under section 2 of the Railway and Canal Traffic Act of 1854 as amended or explained by any other act, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by such company, and reasonable facilities for receiving, forwarding, and delivering traffic upon and from those sidings or private branch railways.

The charges which may lawfully be imposed by a railroad company in England are fixed by the provisions of the Rates and Charges Order Confirmation Act applicable to particular companies. These acts are substantially similar and provide for (see

54 Viet., ch. 121): (1) Maximum conveyance rate (line haul); (2) maximum station terminal rate for use of station accommodations; (3) service at terminals, maximum rate for services in connection with the loading, unloading, covering and uncovering of merchandise; (4) special charges, including, *inter alia*, "*services rendered by the company at or in connection with sidings not belonging to the company.*"

The English cases define with considerable detail the obligations of railroad companies to afford reasonable facilities for receiving and forwarding goods and passengers. The decisions, construing the statutes, recognize the common-law obligations of rail carriers to transport and perform services upon their lines, and distinctly hold that there is, outside of the statute, no obligation to perform services off their lines. Services performed by a carrier upon private sidings are held to be additional services and are required of carriers by statute only upon payment of reasonable compensation therefor.

Referring to the operation of a private switch, Sir Frederick Peale said:

The far end of the siding where Pidcock and Company load and unload is at some distance from its junction with the railway, and the railway company, besides delivering at the junction, take the trucks on to the farther end of the siding. This, of course, is a voluntary service on their part, for no com-

pany is bound to travel beyond its own railway.

M. S. & L. Ry. Co. v. Pidecock & Co., 10 Ry. and Ca. Tr. cases, 150, 159.

In a case arising under section 6 of the Board of Trade Arbitrations Act, 1874, and under sections 5 and 7 of the schedule to the North Staffordshire Railway Co.'s Rates and Charges Order Confirmation Act, 1892, Sir Frederick Peel said:

The North Staffordshire Railway Company claim to be repaid certain expenses incurred by them * * * for works and services at the junction with their railway of sidings belonging to the Salt Union. * * * As to the shunting services for which the railway company claim to be paid, according to the time their engine is engaged shunting, at the rate of 7s. per hour, the schedule to the Charges Act, section 5, subsection 1, gives a railway company power to charge a reasonable sum *by way of addition to the tonnage rate* for "services rendered at or in connection with sidings not belonging to them," but the Salt Union deny that the shunting that is done for them at Malkins Bank or Wheelock is more than is incidental to conveyance. * * * The service the staff perform seems to be a necessary one. * * * I think, therefore, the railway company's claim, as it respects the Salt Union, may be allowed.

Wright, J.: I also agree with the judgment which has been delivered, and I have only to add a statement of the law as we

understand it and have applied it with reference to the railway company's claim to make an extra charge for services on their own line in the delivery and collection of traffic at the traders' sidings.

It is not implied in our judgment that the railway company can charge beyond the conveyance rate for anything done on their own lines which is properly incidental to delivery or collection of traffic to or from sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect. The very existence of the siding implies in practice that the railway company must, in order to collect and deliver from or to the siding, do on their own lines something beyond the mere work of transit. But they may be entitled to make a carrier's or service charge if they are required, for the convenience of the siding owner, *to do work on his siding*; and where they are so required, then, if by reason of the insufficiency of the siding or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge. For instance, a siding may, from its limited size or its situation, be such as not of itself to afford sufficient accommodation for the delivery or collection of its traffic. In such a case, if for the convenience of the trader the company work in and out of the siding, and if in order to do so they

are obliged to make an extraordinary use of their own lines, it may be that their lines would be regarded for this purpose as a prolongation of the sidings, and the company may, according to the circumstances, be entitled to that extent to be paid for the extraordinary work done on their own lines, as if their lines were a part of the sidings themselves.

A. S. Ry. Co. v. Salt Union Limited, 10 Ry. & Co. Tr. Cases, 161, 164, 167.

Upon complaint made by a shipper having a siding that the rate charged was unreasonable, the carrier defended the rate on the ground that part was "for services at or in connection with a siding not belonging to the company." Wright, Justice, said:

"Owing to the disadvantageous position of the applicant's siding, the railway company have to land the trucks past the mouth of the siding, and do something beyond the point at which they would naturally deliver."

Sir Frederick Ponle said:

*"Now, if the mode in which a junction has been affected is such that a company need incur no greater expense in connection with it than is involved in stopping a goods train specially at the siding junction, and either uncoupling trucks there and depositing them on the siding close of the points, or drawing out trucks ready marshaled and attaching them to the train, doing no work within the siding, * * * there is then a*

mere delivery for which no extra payment is due.

Portway v. Colne Valley & H. Ry. Co. et al., 10 Ry. and Ca. Tr. Cases, 211, 217, 220.

In another case involving services upon a private siding, Lawrence, J., said:

The main question of fact in dispute has been: Does the railway company perform any service in respect to this traffic beyond what they are bound to do as carriers *conveying it from one private siding to another*. If they do they would be entitled to charge a reasonable sum in respect thereof under section 5, subsection 1.

Birmingham v. M. R. Co. Ry. Co. et al., 14 Ry. & Ca. Tr. Cases, 24, 33, 34.

In one of the earlier Railway & Canal Traffic cases the court said:

We think the traders [owners of the siding] will do all that is necessary on their part to entitle them to have their traffic taken by the company, without extra payment, *if they place their trucks as near to the junction of their sidings with the main line as they can be brought with safety to the main line*, and with sidings constructed as theirs have been; and if also they take care to arrange their trucks in proper order and clear of any obstacles to their being moved away. * * * Subject, therefore, to the traffic being presented in the way we have mentioned, we are of opinion that the company are bound to receive and forward it for the mileage

rate, and free of any charge for terminal services.

Watkinson et al. v. W. M. & C. A. Ry. Co., 3 Ry. & Ca. Tr. Cases, 5, 9. See also *Birmingham et al. v. Mid. Ry. Co.*, 9 Ry. & Ca. Tr. Cases, 165.

AMERICAN AUTHORITIES.

Private sidings.—A private siding put in at the cost of the shipper or partly at the cost of the shipper and partly at the cost of the railroad is not a part of the railway company's line. As we shall see, the courts of this country in passing upon the question of services upon private sidings hold distinctly that, at common law, a railroad company is not obligated to perform any service *off its own line*; that such additional services are the subject of private agreement. The statute has modified the common law but recognizes the service *as additional to the line haul*.

The Circuit Court of the Western District of Kentucky, speaking through Evans, district judge, in construing the rights of third persons to use a switch connection put in at the instance and for another person, said:

A common carrier cannot be required to receive freight on or along a private switch. Its duty in that regard is confined and limited to its own depots or shipping or receiving points.

Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. Rep., 441, 449.

The Supreme Court of Indiana, speaking through Chief Justice Mitchell, said:

It is undoubtedly true that a carrier is not liable for failing to furnish cars, and for not transporting goods, unless goods are offered at a regular depot, or other usual or designated place for receiving freight.

* * * All that can be done by the owner of goods of the character and quantity of those described, which are designed for transportation, is to place them contiguous to the railway company's track at some usual or properly designated place and request the company to furnish cars and receive the goods.

L., N. A. & C. Ry. Co. v. Flannagan et al.,
14 Northeastern Rep., 370-1-2.

In a case brought to recover a penalty for delay in transporting freight, decided by the Supreme Court of North Carolina, Brown, J., said:

The first assignment of error is that his honor erred in holding that the defendant was required not only to transport the car from Cary to Greensboro within the statutory period, but must within that time place the car upon the plaintiff's side track.

* * * Although this [State] statute was amended by chapter 461, Acts 1907, so as to require a delivery at destination within the time specified, we have held that when the goods arrive, and the carrier has notified the consignee that it is ready to deliver, it has discharged its duty. *Wall v. Railroad*, 147 N. C., 411; 61 S. E., 277. But this statute

as amended does not undertake to compel a railway company to deliver loaded cars off its own right of way and tracks on to the private track of an individual or private corporation. Therefore, a delivery of the car load of lumber to plaintiff upon its private track, belonging to it and leading to its mill, must of necessity be a matter of agreement between plaintiff and defendant and cannot come within the purview of section 2632. A railroad company cannot be compelled to operate its engines on a private track belonging to a private corporation or individual over which the railroad company has no control or supervision.

Brooks Mfg. Co. v. Southern Ry. Co., 68 S. E., 243, 245.

May discontinue service.—In a case involving the depression of tracks and the discontinuance of private sidings the Supreme Court of Minnesota, speaking through Brown, J., said:

At various times during the last 30 years, as the same were demanded or required, the railway company has constructed numerous side and spur tracks connecting with the main track of its said Hastings and Dakota Division, and has maintained and operated the same to deliver and receive freight cars to and from the premises of the plaintiffs. Some of these side tracks are entirely on the respondent company's right of way, and others partly thereon and partly on the lands of the plaintiffs. In some instances the railway company paid the entire cost of their

tract to build a side track, exempting the railroad company from liability for loss by fire from its own negligence, was not void, for the reason that—

In contracting to put in these side tracks, the defendant was not acting in the capacity of a common carrier. It was under no legal obligations to put them in. It might have refused.

Tunn et al v. Pere Marquette Co., 135 Michigan, 210; 97 Northwestern Rep., 724, 725.

Not covered by law rate.—In the Circuit Court of Appeals, Seventh Circuit, the court, speaking through Shawalter, C. J., held:

No satisfactory reason suggests itself against the legality and propriety, under special circumstances such as exist here and as existed in the Covington case, of such a division of his compensation for a carrier even apart from the statute.

The contention that the carriers must move cattle from their lines of road over the track of the stockyards company or the stockyards, without compensation other than as contained in their charges for loading to points on their respective lines in Chicago, and this is what the claim of their appellors amounts to, is invalid.

Walker v. Kewanee, 73 Fed. Rep., 555, 562.

No vested rights.—The Circuit Court of Appeals, Eighth Circuit, Thayer, J., speaking for the court, held that a railroad company could legally decline to place cars for loading coal at the station side tracks and could insist that the mine owner accept

cars from the railroad to be loaded at the mines or private sidings owned by the company for each mine. The court said:

We entertain no doubt that the defendant had the right to abandon the method of receiving coal which is now adopted as Habit 1 and when the conditions that led to the formation of that statute had so far changed as to render its further continuance inconvenient and burdensome.

The privilege which is demanded was essentially different from that accorded to other shippers who had built some tracks on which were built the plants and handled by themselves with much less inconvenience. But their plant standing at its home track which is used for handling other coal machines and for switching purposes, and regularly used at times for the passage of trains.

Hopewell Coal Co. v. R. & O. R. Co., 10 Fed. Rep. 44, 457.

Longshore and Delivery Service.—In a case decided by the Circuit Court of Appeals, Seventh Circuit, the plaintiffs in error were jointly convicted of violating the Elkins Act. The facts consisted in an allowance of \$1 paid due to a trucking company as demurrage for the coal cars and "refund of various charges." The plaintiffs operated a trucking establishment adjoining the tracks of the R. & O. line, within the plant and running around and between the various buildings thereof the coal being at present at \$75,000. It was

Act (act Feb. 4, 1887, c. 104, 24 Stat., 379; U. S. Comp. St. 1901, p. 3154) the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the *Wight case* was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common-law pact between the railroads and the people. But it was not until the Government as *parens patriæ* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

Chicago & A. Ry. Co. v. United States,
156 Fed. Rep., 558, 561, 562.

Not obliged to receive freight on private siding.—
In an action against the Texas & Pacific Ry. Co. for damages for negligence in not keeping a watchman or agent at a station called Meekers the con-

elusions as to the obligations of the carrier regarding a switch on which this station was located are stated by Mr. Justice McKenna of this court as follows:

Meekers was not a regular station; indeed was not a station at all, but a mere switch track. *The defendant was not obliged to receive freight there.* It was, as said by the court of appeals, "a country or plantation switch," established and maintained for the accommodation of the planters of the neighborhood.

Charnock v. Texas & Pacific Ry. Co., 194 U. S., 432, 437.

Illinois cases.—These cases are based upon a constitutional provision, which reads as follows:

All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased, or used, or which can be used, by such railroad companies; and all railroad companies shall permit connections to be made with their track, so that any such consignee and any public warehouse, coal bank, or coal yard may be reached by the cars on said railroad.

In the Vincent case the complainants owned and occupied a warehouse in the city of Chicago, "situated upon the line of the defendant's railroad, and connected with it by a side track about one hundred and fifty feet in length, and situated two blocks

from the freight depot, and between that and the passenger depot." The siding was built under a written agreement which was recorded, the complainant owning the land, and the contract provided for free switching. The question was presented —

whether the appellants have a legal right to insist upon a delivery, at their elevator or warehouse, of grain consigned to them, without discriminating charges against them, such warehouse being connected with the line of the railway in the manner above stated, and, if they have such right, whether the powers of a court of chancery can be invoked to protect it.

After reciting that the railroad company could not deliver this grain in its ordinary depot and that it had been the custom to deliver grain to the elevator to which it was consigned, the court said:

If, then, the common law rule requiring of common carriers an immediate delivery, when practicable, to the consignees, has been relaxed, in regard to railways, only from necessity, it is difficult to perceive why the rule should not be applied, in its full force, to transportation of this character. Here the necessity of relaxation has not only ceased, but the railway is compelled to seek some other warehouse than its own freight depot, and to send its cars, over a side track, to some private elevator. And where there are several elevators thus connected with the main line, in substantially the same mode, it is difficult to conceive how, as a question

merely of common law, the railway company can be permitted to deliver grain to an elevator of its own selection, in place of that to which the property has been consigned.

Vincent et al. v. C. & A. R. R. Co., 49 Ill., 33, 37-39.

The doctrine of *The Vincent case*, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed by a switch, to be connected with its own line. This rule has been reaffirmed in an opinion filed at the present term, in the case of *The People ex rel, Hempstead v. The Chicago and Alton Railroad Co.* (55 Ill., 95). But in the last case we have also held that a railway company can not be compelled to deliver beyond its own line, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

Chicago and Northwestern Railway Co. v. The People, 56 Ill., 365; 8 A. R., 690.

Illinois cases not controlling.—The Circuit Court of Appeals, Sixth Circuit, speaking through Taft, C. J., referred to the Illinois cases, and held that a railroad company as a common carrier is not bound at common law by the establishment and maintenance for any length of time of a switch connection with a private warehouse to maintain it. The court said:

A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either incon-

venient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that State has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. (*Railroad Co. v. Suffern*, 129 Ill., 274; 21 N. E., 824.) But this is very far from holding that there is any common-law liability to maintain a side track forever after it has once been established. The other Illinois cases (*Vincent v. Railroad Co.*, 49 Ill., 33; *Chicago & N. W. Ry. Co. v. People*, 56 Ill., 365) may be distinguished in the same way. They depended on statutory obligations and were not based upon the common law, though there are some remarks in the nature of obiter dicta which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice

Gray's opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

Jones v. Newport News & M. V. Co., 65 Fed. Rep., 736, 740.

Extra service.—If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the transportation, but outside thereof.

Southern Ry. Co. v. St. Louis Hay Co., 214 U. S., 297, 301.

By section 15 the commission is authorized and required, upon a complaint, to inquire and determine what would be a just and reasonable rate or rates, charge or charges. This, of course, includes all charges, and the carrier is entitled to have a finding that any particular charge is unreasonable and unjust before it is required to change such charge. For services that it may render or procure to be rendered *off its own line* or

outside the mere matter of transportation over its line, it may charge and receive compensation. *Southern Railway Co. v. St. Louis Hay Co.*, 214 U. S., 297. If the terminal charge be in and of itself just and reasonable it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust. In order to avail itself of the benefit of this rule the carrier must separately state its *terminal or other special charge* complained of, for if many matters are lumped in a single charge it is impossible for either shipper or commission to determine how much of the lump charge is for the terminal or special services. The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and commission that it is insisting upon it.

Interstate Commerce Comm. v. Stickney, 215 U. S., 98, 105.

Freight requiring special facilities.—Referring to the liability of a common carrier to provide suit-

able facilities for receiving live stock, this court, speaking through Mr. Justice Harlan, said:

The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But, it is contended, that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, *free from any charge other than the customary one for transportation, for* merely passing into and through the yards of the Covington Stock-Yards Company to and from the cars of the railroad company.

* * *

In other words, the duty to receive, transport, and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee. * * *

There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. * * *

Covington Stock-Yards Co. v. Keith, 139 U. S., 128, 133, 134, 135.

Carrier not obligated to deliver at particular yards.—In *Central Stock Yards Company* case this

court, speaking through Mr. Justice Holmes, said:

If the cattle are to be unloaded, then, as was said in *Corington Stock-Yards Company v. Keith*, the defendant has a right to unload them where its appliances for unloading are, and can not be required to establish another set hard by. * * *

We have discussed the case as if the two stockyards were side by side. They were not, but they both were points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. * * *

As the defendant would not be bound to deliver at the Central Stock Yards *if they were by the side of its track*, its obligation is no greater because of the intervention of a short piece of the track of another railroad.

Central Stock Yards v. Louisville, etc. Ry. Co., 192 U. S., 568, 570-72.

May not discriminate by special services.—In the *Nashville Stock Yards* case, in the Circuit Court, M. D. Tennessee, Chief Justice Baxter, said:

By the permission or acquiescence of defendant, complainants' yard was connected with defendant's road by appropriate stock gaps and pens, which have been in use by both parties for more than twelve years.

The railroad company made an arrangement with the Union Stock Yards Company in Nashville for the delivery of stock and stipulated that after

a certain date it would deliver stock only at the Union Stock Yards. Complainants filed a bill to enjoin the railroad company from refusing to deliver their own stock at their private yard. The court indicates that there was involved in the case some intentional discrimination, and further said:

Or may such railroad company, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?

If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the public. By an unjust exercise

of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one community for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever.

Coe et al. v. L. & N. R. Co., 3 Fed. Rep. 775, 776, 779-80.

Charges may be separated.—In a case involving an extra charge per car in Chicago for delivering live stock to the stockyards this Court, speaking through Mr. Justice White, now the Chief Justice, said:

As the right of the defendant carriers to divide their rates and thus to make a distinct charge from the point of shipment to Chicago and a separate terminal charge for delivery to the stockyards, a point beyond the lines of the respective carriers, was conceded by the Commission and was upheld by the circuit court of appeals, no contention on this subject arises. If, despite this concurrence of opinion, controversy was presented on the subject, we see no reason to doubt, under the facts of this case, the correctness of the rule as to the right to divide the rate, admitted by the Commission and announced by the court below. This is especially the case in view of the sixth section of the act to regulate commerce, wherein it is provided that the schedules of rates to be

filed by carriers shall "state separately the terminal charges and any rules or regulations which could in anywise change, affect, or determine any part of the aggregate of said aforesaid rates and fares and charges."

Inter. Com. Commis'n v. Chicago &c. R'd Co., 186 U. S. 320, 335.

The act to regulate commerce in section 6 provides that:

The schedules * * * shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.

Industrial railroads not common carriers.—A railroad constructed and used merely in connection with the conduct of a private business is not a common carrier, so where a railroad is built to haul logs from the forest to the sawmill of the owner it is not a common carrier.

White v. Kennon, 83 Ga., 343; 9 S. E., 1082.

Wade v. Litcher & M. C. Lumb. Co., 74 Fed., 517.

Nicolette Lumb. Co. v. Peoples Coal Co., 26 Pa. Supr. Ct., 575.

Plant facility.—The circuit court of appeals, dealing with a provision of the State constitution which dealt with corporations of public improvement and utility, said:

We would not suppose that the learned counsel would seriously contend that article 244 of the State constitution, dealing with corporations of public improvement and public utility was intended to, or could be so construed as to, make out of a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for private purposes, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar mill, and used for carrying cane thereto, should be declared a common carrier.

In Louisiana it was held that a corporation organized to carry freight and passengers between two sugar plantations about five miles distant from one another, the sole object of which was to foster the private ends of two persons named, who owned jointly two sugar plantations, and who wished to transport sugar cane grown on one of the plantations to the refinery situated on the other, was not necessarily such a corporation for public improve-

ment as would authorize the appropriation of private property for its purpose.

Williams v. Judge of 18th Judicial Dist. Ct., 45 La. Ann., 1295; 14 So., 57.

Not common carrier.—A strictly private spur track leading from private property to the line of a public railroad over which the public can have no rights is not a common carrier. This was applied in Illinois to a tramroad running from one portion of a coal field to another. The court said:

It is clear the use for which the land is proposed to be taken in this case is not a public one. The coal, the coal works, and the present tramway are in the strictest sense private property, and the public generally have no more interest in them, or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character or the obligations of the company to the public in the slightest degree.

Sholl v. German Coal Co., 118 Ill., 427; 10 N. E., 199, 201.

In another case, where the company sought to condemn land for a track, the court said:

Stripped of all the disguises thrown around the case of the petitioner, it is shown that its object is to condemn the land of the defendants for the purpose of enabling it to

lay a siding, switch, branch road, or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, "of transporting freights to and from said steel works over the petitioner's said railroad." This clearly was for the private accommodation of both the railroad and steel-works, and to make the private business of both more profitable. This was not for a public, but was for a private, use, and the taking of the property, under these circumstances, would be the taking of private property for private use, which is clearly prohibited.

Pittsburg W. & K. R. R. v. Benwood Iron Works, 31 W. Va., 710; 8 S. E., 453, 467.

Montana case.—This case, often cited, is based upon a constitutional provision which provides that:

All railroads shall be public highways, and all railroads, transportation, and express companies shall be common carriers, and subject to legislative control, etc.

This provision is supplemented by a statute authorizing the construction of sidetracks, branches, etc., which made them instruments of public service. (*Butte A. & P. Ry. Co. v. U. Ry. Co.*, 16 Mont., 504; 41 Pac., 232 and 239.)

In the foregoing case the court, speaking through Hunt, Justice, said:

It is well established that if, in point of law, a use is public, the fact that not very

many persons will enjoy the use is not material. (*Fallat v. Hudson*, 16 Gray, 417.) The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. (*Phillips v. Watson*, 63 Iowa, 28; 18 N. W., 639; *Lewis, Em. Dom.*, p. 241; *Shaver v. Starrett*, 4 Ohio St. 496; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn., 461; 43 N. W., 469; *Rand. Em. Dom.*, 36.)

A common carrier way, as to a certain shipper, be a plant facility.—In *Crane Iron Works v. United States et al.*, No. 35, United States Commerce Court, in an opinion by the presiding judge, the question here involved was carefully considered. In that case the court said (italics ours):

In the operation of this plant it is necessary to transport loaded cars received by rail to various points within the limits of the plant for unloading, to transport cars which have been loaded with its product from various points within the plant to the line of railway by which they are taken to destination. * * *. For these purposes the iron works long ago laid down rails extending from a connection with the Central Railroad to the various points within its plant where cars were to be placed * * *. The iron works also provided the necessary locomotives for operating the various tracks

which it had built to accommodate the needs of its plant. * * *

For this service the petitioner has never received and, until the organization of the Crane Railroad, had never claimed that it should receive compensation from the Central Railroad. Indeed, it seems to have been assumed that these tracks and engines were a necessary part of the plant of the iron works, whose business could not be properly carried on without them.

In process of time a few other industries, perhaps half a dozen, were located in close proximity to the premises of the iron works, though not upon its land, and these industries were so situated that loaded cars could be transported between the tracks of the Central Railroad and the industry only over the rails of the Crane Iron Works. For the purpose of serving these industries the Crane Iron Works extended its rails beyond its own land to these several plants. Cars for these industries were placed upon the same track with those intended for the iron works and taken by the locomotives of the iron works over the rails of that company to the several industries. * * *

The principal contention of petitioners appears to be that the Crane Railroad Company is a common carrier, subject to the provisions of the act to regulate commerce and the jurisdiction of the Commission; * * * that as such common carrier the Crane Railroad Company is legally entitled to compensation for the transportation service which it is alleged to perform for petitioner; * * *.

Quoting the statute, "The Commission may also, after hearing, * * * establish through routes and * * * joint rates * * *," the court further said:

Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad *was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this conclusion.* The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Co. v. N. Y. C. & H. R. R. Co. et al.*, 14 I. C. C. Rep., 237; *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I. C. C. Rep., 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

In the transportation of supplies and employees of contractors, in connection with the construction of its own road, a railroad company does not act as a common carrier. It is a common carrier as to part of its traffic, but not such a carrier as to the traffic in which it is interested. (*Santa Fe Ry. v. Grant Bros.*, 228 U. S., 177.)

The definition and character of a railroad is determined by the purposes or objects for which it was constructed. (*I. C. C. v. B. & O. S. W. R. R. Co.*, 226 U. S., 14.)

A rebate.—This Court has stated that these allowances to tap lines from the lumber rates are rebates.

In *Illinois Central R. R. v. I. C. C.*, 206 U. S., 441, 444, the difference in the practice on the two sides of the river was explained in the following language:

The railroads west of the Mississippi make a certain allowance to the mills which have "logging roads"—that is, roads by which logs are hauled from the timber to the mills. This is called "tap-line allowance or division." * * * The mills east of the river have logging roads also, but appellants make no allowance to them. * * * There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, and it amounts to a *rebate* or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same.

Device.—The act to regulate commerce prohibits rebating in any form, directly or indirectly, “by any device whatever.” Construing this phrase in the *Armour Packing Company v. United States*, 209 U. S., 56, 71, 72, this court, speaking through Mr. Justice Day, said:

* * * And we find the word device disassociated from any such words as fraudulent conduct, scheme, or contrivance, but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be “that which is devised or formed by design; a contrivance; an invention; a project,” etc.

* * * * *

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and

posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

The latest case, and one bearing upon the lawfulness of an allowance for services in spotting cars on private side tracks, was decided in January last by the Supreme Court of New York, Schenectady trial term, opinion by Van Kirk, J. The court said:

I find that the 20 cents per ton is a reasonable charge for the work done and for which payment is claimed. The vital question, therefore, is whether or not this service is a part of the regular transportation service covered by the lawful, published freight rate. Is it a part of the service which the plaintiff is obliged to render as a common carrier of in and out freight? Is it service before delivery to the consignee and after acceptance from the consignor? If it is, the defendant's claim is lawful; if it is not, it is unlawful. (*Int. Com. Comm. v. Diffenbaugh*, 222 U. S., 42.) In order to answer this question it is necessary to determine where transportation begins and ends, where the delivering and receiving point is;

* * * * *

The general freight rate from point to point may not include an element for spotting (where it occasions appreciable expense), as such

actually results in an unjust charge to those for whom spotting is not done.

* * * * *

I find that the delivery on the storage tracks is a delivery to defendant; that the transportation begins and ends there; that plaintiffs published tariff includes no charge for service upon a "private siding"; that no transportation on a private siding further than to make clearance can be required from the carrier.

N. Y. C. & H. R. R. R. Co. v. General El. Co.,
83, Misc. 539, 543, 544.

ARGUMENT.

The line haul, and moving cars upon a private siding, are independent and different services.

The line haul.—By an unbroken line of authorities, in England and in this country, it is established that, without statutory requirement, a carrier by railroad can not be compelled to perform services off its own line. But where private sidings are put in and used by shippers and consignees the carrier must receive carload traffic from, and deliver it to the private siding at the points of connection. The cars must be marshalled at the points of connection between the siding and the main line *by the shipper* so that they may be taken by the carriers' locomotives without operating upon the private siding, and the carrier makes delivery to the consignee by shunting the car upon the private siding *clear of the main track*. Some very large industries have, at the point of connection, "exchange tracks" and the cars

are marshaled upon these tracks by the shippers. The "transportation" or "conveyance" is between these points of connection; and this constitutes the line haul for which the line rate is charged.

Switching.—As the shipper must load and the consignee unload the cars, the cars must necessarily be moved upon the siding to and from the mills, warehouses, and plants of the shipper and consignee. The tracks are not public and this movement is not a "public" service. It is a private service for the shipper or consignee for whom it is performed. As the court said in *Chicago & A. Ry. Co. v. U. S.*, *supra*, referring to private sidings, "their only use was in getting a particular shipper's freight from his own property out to the public highway." When this switching service is performed by the line carrier it is paid for as a car movement and not upon a tonnage basis. Switching charges are always per car, while for a line haul there is a tonnage charge—so much per hundred or per ton for the car contents. Switching is as distinct and separate a service as icing or refrigeration or any of the other services mentioned in the statute and declared to be "transportation" for the purposes of the act. The purpose of the statute is regulation. It is intended that all services performed by a carrier subject to the act shall be brought under the regulatory power of the Commission. These charges are to be included in the published tariffs and thereby become "lawful" charges. In doing this Congress did not declare that such additional or special services should be per-

formed by the carrier as a part of the line haul for the line rate. On the contrary, the statute expressly provides that these services shall be, performed for compensation, and the Commission may be, and often is appealed to to determine whether such charges are reasonable.

We must conclude, therefore, from the authorities and the reading of the statute that the shipper has no right to demand that switching services be performed free of charge, but that the carrier has the right to make a separate charge appropriate and reasonable for this distinct service.

Discrimination.—It has been a common practice in this country for the carriers to absorb a switching service at some places and in special cases; to do the switching without making any charge therefor in addition to the line rate. The right of the carrier to do this is not questioned provided such *free service* does not work undue discrimination between shippers or localities. If this practice in any case gives an undue preference and advantage to a shipper the Commission, upon full hearing, may order the practice discontinued. The practice of absorbing switching services on private sidings is not universal. There are as many and perhaps more instances where a switching charge is published and collected. Some general principle or test must, therefore, be applied to determine whether performing a switching service on a private siding *free of charge* by a carrier is unduly discriminatory.

In *Wight v. United States*, *supra*, this court held that an accessorial service allowed to a single shipper was discriminatory because the service was not given to all shippers at that place.

We are not unmindful that this court has said that the law does not undertake to equalize the fortunes or conditions of man. Mere inequality of condition, therefore, does not create the undue discrimination or preference prohibited by the statute. But when the carrier performs for a shipper a service which is accessorial and thereby relieves that particular shipper of a burden which rests upon him, and does not perform the same service for other shippers at the same place, it is unlawful. This is not equalizing the conditions or fortunes of men; it is simply preventing preferences. To illustrate, two shippers in the same business, competing with each other, have warehouses located 2,000 feet from the line of a railroad; they deliver their carload traffic at the team track by drays at a cost of 50 cents per ton; the cost of loading a 30-ton car is \$15. The conditions, or fortunes, of these two shippers in this matter are precisely alike. Suppose now that one shipper puts in a siding, connecting his warehouse with the main tracks and the line carrier spots his cars at the warehouse and takes them loaded from the warehouse charging for the switching service \$5 per loaded car. Assuming this to be a reasonable charge and all that can be required, the conditions or fortunes of these two shippers are now disturbed. One is

still draying at a cost of \$15 per car and the other is delivering to the carrier at a cost of \$5 per car plus interest on his investment in the siding. The law does not undertake to equalize their condition by raising the switching charge. One shipper has put in a modern improvement that has reduced the cost of doing his business and he is entitled to that advantage. But suppose the carrier absorbs the switching service upon the siding, then, by an artificial, contractual relation voluntarily entered into by the carrier, the shipper is relieved entirely of the burden and expense of doing a part of his business—that of delivering his traffic to the carrier. This burden is assumed by the carrier. Clearly in such a case the carrier is giving an undue preference and advantage prohibited by the statute. As well might the carrier collect the \$5 switching charge and pay it back, as to perform the service without charge. It is no less a rebate when he performs the service free than it is when he pays back the money.

Again, the theory upon which the carrier is permitted to absorb a switching service is that the line rate is sufficient to cover the line haul and the switching. It must be observed, however, that if the line haul is sufficiently high to cover an additional service then it is too high to be charged to the shipper who does not receive the additional service. If the line rate is a reasonable charge for the line haul then the carrier is performing an additional service for which no remuneration is collected and the cost of that

service must be made up out of the public in some other way. In either view the practice of absorbing a switching service for one or more shippers having sidings where there are other shippers who do not have sidings but are compelled to deliver their traffic at their own expense to the team tracks, necessarily and inevitably works a discrimination. The only cases in which there is no discrimination are at points where all shippers have sidings and are served alike. But where some have sidings and others must deliver by drays, the only nondiscriminatory and equitable practice is to make the line rate reasonable for the line haul and make a reasonable charge for the additional service on private sidings. All shippers then pay the line rate and the shippers who receive the additional service on sidings compensate the carrier for it. Each shipper pays for what he gets.

A switching service can not be an integral part of a through route.

Section 1 of the act to regulate commerce requires common carriers subject to the act "to establish through routes and just and reasonable rates applicable thereto;" and to provide reasonable facilities for operating such through routes; "and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." If carriers subject to the act do

not comply with these requirements of the law the Commission may, after hearing, establish through routes and joint rates and prescribe the division of such rates, and the terms and conditions under which such through routes shall be operated. (Section 15.) Then follows this limitation:

And in establishing such through route, the Commission shall not require any company, without its consent, *to embrace in such route substantially less than the entire length of its railroad* and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which would otherwise be established.

The use of the term "through route" and the limitations put upon the Commission in establishing through routes show clearly that Congress had in mind only line hauls. A switching movement upon a private siding, at the point of origin or destination of freight, is not a part of a route. It is as above noted, *a service which precedes or follows* a line haul, and this is equally true whether the line haul be over a single railroad or over a through route composed of several lines.

The fact that private sidings and switches are included within the definition of "transportation" and "railroad" in the act, does not justify the claim that they may become an integral part of a through

route entitled to a division of the joint rate. Icing, storage, refrigeration, sleeping-car service, and other things are also included within the term "transportation," but no one would contend that a through route could be made out of a line haul and icing, sleeping-car, or any other of these incidental or additional services. In moving over a through route there is very much switching performed—the passing of trains, the transfer of cars from one railroad to another—but these services are incidental to and not the basis of the through route.

These tap lines, therefore, are not entitled to through routes, even if they be *bona fide* common carriers, when the service rendered is nothing more than switching cars of lumber from the mill to the main line. It is not transportation, using that word in the sense of conveyance or line haul; it is bringing the freight to the public highway or line carrier. It can not, therefore, be a segment in a through route.

Here it may be well to observe the difference between the words "allowance" and "division," as used in the statute. The former applies to allowances made to a shipper under section 15 for services which the carrier can be compelled to perform, but which he allows the shipper to perform. The word "division" applies only in cases of through routes, to the portions of the joint rate which each line carrier receives. If the services performed by a shipper is a switching service, the allowance will be a switching charge, that is, a charge per car, and such allowances have been made to tap lines. They

complain of this and say they want a "division." The reason for this is apparent. A switching charge would be from \$1.50 to \$5 per car. The divisions which have been improperly allowed by carriers were on the theory that a switching movement was a part of the through route, and "divisions" were made ranging from 2 to 4 cents per 100 pounds, making the "allowance" to the shipper or its tap line \$12 to \$18 and \$20 per car. Of course, they want "divisions." But the character of the service must always determine the compensation. If the service is switching the allowance will be a switching charge; if it be a line haul over part of a through route there will be a "division" of the joint rate.

Spurs and branch lines.—This court, construing the phrase "lateral branch line of railroad, or private side track," in our act, said:

They are dependent upon and incident to the main line—feeders such as may be built from mines or forests to bring coal, ore, and lumber to the main line for shipment. *U. S. v. B. & O. S. W. Ry., supra.*

From this and other authorities cited spurs and branch lines are longer than a switch, but like the switch are intended to reach a shipper's warehouse or place of business or to accommodate a group of shippers. They furnish a cheap and expeditious means for making the shipper's delivery. The service is special and precedes the main line haul; in quality it is precisely the same as the service performed upon a switch; it is *gating the shipper's traffic*

to the main line; it is an additional service to the main-line haul; it is not a part of a through route and is not covered by the line rate. What we have said, therefore, in reference to the operation of a switch by a carrier applies with equal force to services performed by a carrier upon a spur or a branch-line railroad, the only difference being that the compensation for services upon spurs and branch lines is usually computed upon tonnage, while the compensation for services performed upon a switch is a charge per car. This difference in the mode of arriving at charges does not modify or affect the general principle here discussed as to its relation to the line haul.

II.

Transportation of logs.

Logs are the raw material out of which lumber and other forest products are manufactured. Their relation to lumber is the same as the relation of wheat to flour, iron ore to steel. In all tariffs and classifications logs are recognized as a distinct commodity, the rates upon which are fixed with reference to value, loading, and the distance transported. The cost of milling lumber or other like products involves the cost of the logs at the mill, and this necessarily involves the cost of transporting them there. A sawmill is usually located upon a line railroad and has a switch connection for the delivery of carload lumber. If the forest is near, the logs are hauled by team. As the timber is

cut away the log haul increases, and logging roads of various types are put in to reduce the cost of transporting the logs from the forest. Whether the mill transports its logs from an immediate territory or buys them on the Pacific coast and has them shipped a long distance, the cost of the transportation in either case and in all cases is a part of the cost of the logs at the mill. Any practice, therefore, by line carriers which relieves the mill owner of the reasonable charge for the transportation of logs *is a direct contribution to his net operating revenue*. There is no more reason or right for a common carrier to contribute to the mill owner the cost of transporting logs than there would be in contributing the logs themselves, or furnishing the mill owner with forests free from which he might cut his timber. In either case the carrier would be making a direct contribution to the net operating revenues of the mill owner, and the purpose in making such a contribution would be to get the lumber traffic. There is no difference in principle between buying the lumber traffic by giving a free service and buying the traffic with money or a cash rebate from the published rate.

Any practice by a carrier which results in contributing to a mill owner the cost of transporting his logs, or any part of the fair charge for transporting them, to secure his lumber traffic, is unlawful, and a violation to the statute.

III.

The milling-in-transit privilege as practiced by tap lines.

The evidence in this case shows two practices. The first is the more general. It consists of the tap line filing with the Commission a logging rate with a milling-in-transit privilege, then arranging with the line carrier for a "division" of the lumber rate, and applying the lumber rate to a tap line "station" at the forest where the logs originate. The line carriers put in a blanket rate on lumber, which applies to every station in this territory, covering parts of three States of the Union, with a concurrence in milling privileges established by "connecting carriers." They then established through routes and joint rates over their own lines and the tap lines. The "joint rate" being the blanket lumber rate, the result of this arrangement is, that when the logs are milled into lumber at the mill, the blanket lumber rate is extended to the terminal of the tap line at the forest; the tap line is given a division of the blanket lumber rate, and the charge for the log haul is *entirely obliterated*. By this method a mill owner secures the transportation of the logs from the forest to his mill without paying anything for the transportation. The allowance which he receives from the line carrier out of the lumber rate pays the entire cost, and often more, of the transportation of the logs from the forest to the mill.

This tap line milling-in-transit differs radically from the milling-in-transit upon main-line railroads. The tariffs of the Chicago, Rock Island & Pacific Railway, Kansas City Southern Railway, Missouri Pacific Railway and other main lines give milling-in-transit privileges upon logs. The logs are charged a high rate, often a penalty rate, from the forest to the mill. After they are milled, if the lumber is shipped out over the same line, the lumber rate is charged in full and the log rate into the mill is reduced, but still remains a substantial charge. Take the instance given by our Division of Tariffs upon the Rock Island road, which is typical of the practice by line carriers. There are two stations, Moreland and Ruston, in the State of Louisiana. They are 99 miles apart. The blanket lumber rate into Memphis, Tenn., from both these points is 14 cents; there are two rates published on logs from Moreland to Ruston; one is 11 cents, called the "Billing rate," the other is $3\frac{1}{2}$ cents, called the "Net rate." If the logs are hauled into Ruston by the Rock Island and the lumber is transported over the Rock Island lines from Ruston to Memphis, the total charge is $17\frac{1}{2}$ cents—the full lumber charge of 14 cents from Ruston and a $3\frac{1}{2}$ -cent charge for the log haul from Moreland to Ruston. Now, if we take a tap line extending 99 miles from Ruston to a station called "Tap Line," the application of the tap line billing practice would be to extend the 14-cent lumber rate back to "Tap Line." The result would be that a mill owner at Ruston owning a forest or purchasing his

logs at Moreland would pay for his log and lumber haul 17½ cents, while a mill owner at Moreland, having a forest at "Tap Line" and being the proprietary owner of the tap-line railroad, would pay 14 cents for his total log and lumber haul, thus creating a very great discrimination and preference in favor of the mill owner having the tap line.

To meet this objection, so apparent and manifest, some of the tap lines that have so-called independent mills upon their lines have put in a small charge for the log haul, which they collect from the independent miller and also make a hook charge against the proprietary company for the hauling of logs. This charge in one case, which is the highest made, is 1½ cents. This rate is published, but it is no part of the through rate. It is an *intrastate rate*. The tap line secures a division of the lumber rates on its milling-in-transit privilege, without regard to the fact that it is collecting 1½ cents from the independent mill. This log charge the tap line collects without accounting for it upon the joint through-route rate. This furnishes a weak argument to meet the objections of the lumber men.

The so-called independent mill is usually a sort of by-product for the proprietary mill. These independent mills do not manufacture the same kind of lumber manufactured by the proprietary mill, or do not, for other reasons, compete with the proprietary mill owning the tap line. An independent mill owner is allowed to establish his mill upon the tap line a few miles from the main-line railroad. He gets his mill

site from the tap line mill owner; he buys his timber from him; the proprietary mill owner's tap line hauls the logs to the mill and makes a small charge for the haul. The tap line then arranges with the main-line railroad for a through route, and as the originating carrier secures a large division of the blanket lumber rate, 2 to 4 cents per 100 pounds. The independent mill therefore becomes a by-product to the proprietary lumber company. We do not say that there is anything unlawful in the proprietary mill's arrangement with the independent mill; but we do say that the whole arrangement, when properly viewed in connection with the dominant traffic of the tap line owner, is a device for securing divisions out of the main-line lumber rates for services which are only a shipper's delivery over a spur track. The delivery of the lumber from the proprietary mill over the switch to the main-line railroad is a shipper's delivery of his traffic. The public should not be charged for performing this service, for we must bear in mind always, as stated by the Commission in the *terminal case*, that where a substantial benefit is given by a carrier to a shipper by way of allowances out of main-line rates, a loss results that is made up by charges upon other traffic, and in that way the public bears the burden.

This practice of absorbing the log haul is a bald, open contribution to the mill owner.

The so-called *milling-in-transit* privilege, as practiced by the tap lines, results in free log hauls and is unlawful. Any practice by which the line carrier

assumes the burden of transporting logs for a mill owner is a rebate, the purpose of which is to buy the mill owner's lumber traffic.

IV.

Matters claimed by the tap lines as bases for through routes and divisions of the main-line lumber rate.

Incorporation.—The act to regulate commerce makes no distinction, in the application of the provisions of the act, between corporations or persons. The privileges of, and prohibitions upon, practices in transportation apply alike to incorporated companies and carriers that are not incorporated. A group of men may carry on a business of transportation; at a later time they may incorporate that business and issue the stock to themselves; this change in the ownership and operation does not confer any additional rights or subject them to any additional or different obligations or penalties. The mere act of incorporating a logging railroad or tap line does not confer, in itself, any special privileges.

Common-carrier tap lines.—After the passage of the Elkins Act, a great number of logging roads were incorporated under State statutes as common carriers. These statutes are general incorporation acts, under which a specified number of persons may become incorporated for any purpose stated by them in their application.

While in most cases this confers upon the corporation certain rights and, when they offer to carry property for other persons, may constitute them common

carriers as to such traffic, it does not prevent an inquiry into the whole matter to determine whether they are *bona fide* common carriers as to all traffic. The power to investigate and determine whether such incorporation and incidental common carriage is assumed as a device for the purpose of evading the Federal law and securing rebates or unlawful discriminations or preferences upon the traffic of the proprietary owners, can not be defeated by this arrangement.

Prior to the enactment of the "commodities clause" and the conference of power upon the Commission to determine whether or not rates and practices by railroads are unlawful and to prescribe reasonable rates and practices for the future, this court held that a practice by two line carriers which resulted in a violation of the Federal act prohibiting discrimination in transportation rates could be enjoined; that the court could look through the forms adopted by the carriers—the business in itself then being otherwise legitimate—to ascertain whether *in fact* it resulted in a violation of the act to regulate commerce. (*New Haven R. R. Co. v. Interstate Com. Com.*, 200 U. S., 361.) The power which the court in that case exercised has since been vested in this Commission. The Commission may now investigate the form and method of carrying on interstate transportation business, and if after full hearing it is of the opinion that any "practices whatsoever" are "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any

of the provisions of this act," it may prescribe what "practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, * * *." (Section 15.) If the practice by line carriers could be investigated by the court prior to the act of 1906 and, if found to be in violation of the act, be prohibited, certainly since the act of 1906 a practice by a line carrier in connection with a tap line may be investigated by the Commission, and if found to be unlawful it may be prohibited. Common carriage of a small outside traffic, by the tap line, can not defeat this power.

Common carriers as to part.—In the *Crane Iron Works* case, the Commerce Court said:

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers.

The fact that these tap lines have been incorporated by proprietary mill owners, and may be regarded as common carriers as to some outside traffic, does not prevent the Commission from finding, if it be true, that as to the traffic of the proprietary mill they are a plant facility performing a plant service. (*A., T. & S. F. Ry. v. Grant Bros.*, 228 U. S., 177.) Nor does it follow that because they transport lumber for an outside party over what is practically a spur track, that such transportation is anything more than a shipper's delivery to a main-line carrier.

A railroad originally organized as a tap line may develop into and become a line carrier; when it does, the Commission will so recognize it. Each particular case must be decided upon the character of its particular traffic. It is *the character of the transportation service*, rather than the character of the agent, which determines whether the agent is entitled to through routes and joint rates.

Device.—The act to regulate commerce prohibits rebating, directly or indirectly, “by any device whatever.” Construing this phrase in a criminal proceeding, this court, speaking through Mr. Justice Day, said:

* * * the act seeks to reach all means and methods by which the unlawful preference or rebate, concession, or discrimination is offered, granted, given, or received * * *. A device need not be necessarily fraudulent, the term includes anything which is a plan or contrivance * * *. It is not so much the particular form by which, or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions or rebates from the fixed rates duly posted and published. (*Armour Packing Co. v. United States, supra.*)

In the case at bar the Commerce Court recognized the power of the Commission to investigate and determine whether or not a tap line was a *bona fide* common carrier. It said:

The evidence before the Commission tending to show that the petitioning tap lines were

originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, *might have justified the Commission in finding that these tap lines were not in fact bona fide common carriers.* (Rec. 190.)

The Commission therefore has power, and it is its duty, being charged with the enforcement of the provisions of the act to regulate commerce, to investigate and determine whether a particular tap line is, in fact, a *bona fide* common carrier *as to all of its traffic*; to ascertain what the nature of the transportation service performed by the tap line is, and from all the evidence determine whether the organization, the methods of doing the business, and the transportation service carried on, is in fact a device to secure rebates and concessions from the published rates. If, upon such investigation, it is found that such was, and is the purpose of the organization and practices, it becomes

the duty of the Commission to prohibit the line carriers from establishing through routes and joint rates that result in such rebating and discrimination.

General observations.—The investigation in this case has developed a widespread commingling of the business of transportation with private business. The aggregate amount of the allowances out of main line lumber rates is enormous. It reduces legitimate railroad revenues by an insidious system of rebating. The purpose in this case is to separate the public business from private business; to insure to public line carriers reasonable compensation for every substantial service that they render; to place upon each shipper the duty of paying the reasonable charges for the services which he receives; to prevent private enterprises from casting upon the public, through the common carrier service, a part of the burden of doing their private business. Each shipper should perform its interplant service, and deliver its traffic to the line carriers.

This requires the separation of the charges for the line haul from switching charges where absorption of the switching service is not permissible. It is within the power of the Commission to require that this shall be done.

After holding that icing is a transportation service under the statute, this court, speaking through Mr. Justice Lamar, said:

It [the Commission] may prescribe the form in which schedules shall be prepared and arranged (section 6) and may approve tariffs

stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those orders are void.

Atchison, Topeka & Santa Fe Ry. Co. v. United States et al. Opinion filed January 26, 1914.

V.

OPINION OF THE COMMERCE COURT.

In the four cases under consideration the tap lines are named in the first list given in the order. (Rec., p. 180.) The Commerce Court deals with that part of the order relating to these tap lines, which reads:

that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common-carrier railroad but is a plant service

by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports. (Rec., pp. 180, 181.)

The Commerce Court in its opinion concedes much that we claim, but seems to have confused the findings and order of the Commission in regard to some specific matters.

As already noted, the Commerce Court concedes that there was evidence before the Commission which might have justified the Commission in finding that these tap lines were not *bona fide* common carriers. (Opin., p. 7.) If they are not *bona fide* common carriers, what are they? There is but one answer; they are plant facilities, and the Commission so found. While fully recognizing that the Commission found that they are plant facilities, the Commerce Court says that the Commission held: "That each of the petitioning tap lines is a *bona fide* interstate common carrier." (Opin., p. 6.) A reading of the order shows that this is not a correct representation of the Commission's finding. The Commerce Court, in the final analysis, seems to take the position that if they were common carriers as to *any* traffic they were necessarily common carriers as to all like traffic for the proprietary companies; that they could not be plant facilities as to part and common carriers as to part of their traffic, although the court in another part of the opinion states that they may be.

The law is clearly settled,

That a common carrier may, however, as to some of its work, act in a strictly private capacity is well settled (*A., T. & S. F. Ry. v. Grant Brothers*, 228 U. S., 177); and that it may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, has been held by this court in *Crane Iron Works v. U. S.*, No. 55, June 7, 1912. (Rec., pp. 192, 193.)

An attempt is made to distinguish the *Crane Iron Works* case by saying that the services in that case were "interplant" services. This is not the fact. The larger part of the service in that case, as in this, was switching cars from the warehouses to the line railroad—delivering the freight to the carrier.

Disregarding the similarity in the cases the Commerce Court proceeds to say:

When, as in these cases, a full and fair hearing has been granted, the Commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the record before it or are arbitrary in *being based upon improper distinctions and considerations*. (Rec., pp. 193, 194.)

* * * * *

The important questions, therefore, to be considered by this court are:

First. Whether the Commission acted arbitrarily and on improper considerations in de-

termining under what circumstances a common carrier tap line would be deemed to be acting as a mere plant facility of and performing mere plant service for the proprietary companies. (Rec., p. 195.) * * *

Referring to the evidence, the Commerce Court says:

It is apparent therefrom that very real evils existed, evils demanding correction. (Rec., p. 198.)

* * * * *

The power of the Commission to prevent such rebates and unjust discriminations is beyond question. (Rec., p. 199.)

Then, as a basis for holding that the action of the Commission was arbitrary, the Commerce Court makes the following statements (Rec., p. 205):

In effect the Commission holds:

First. Switching service within 3 miles of a trunk line is by custom included in the through rate.

Second. Such switching is a transportation service.

Third. For switching products of a proprietary mill located within the 3-mile limit, no division of the through rate may be made, but an allowance, under section 15, may be paid either to the industry or to its tap line, if the trunk line prefers to permit the industry or tap line to do this work.

Fourth. For switching products of a non-proprietary mill an allowance may be given, and, in the case of a common carrier tap line, a division out of the through rate should be made.

Fifth. But no such allowance or division shall be made if the proper switching distance is or should be less than 1,000 feet.

Sixth. * * *. *Neither allowance nor division is to be given the tap line for switching the products of such a proprietary mill.*

In our judgment, *these distinctions must be regarded as arbitrary and without justification as a matter of law.*

We have shown that switching is an independent and distinct service. This the Commission recognized, and where allowances are made for this service—switching cars from the mill to the main track—it is a per car or switching allowance. The *switching allowance* is given, when asked for (see Victoria & Fisher Ry.), under section 15, but in cases where a “division” of a through rate is insisted upon for a switching service, it is refused. The Commission found, as a fact, that in this territory the line carriers absorbed all switching services to a distance of 3 miles. Accepting this fact the Commission held that if they absorbed this service for shippers generally, then where they permitted a shipper or its tap line to do the switching, an allowance of a reasonable switching charge (per car movement), might be made under section 15. This applies to all traffic when such an allowance is asked for. The Commerce Court fails to distinguish between “allowances” under section 15 and “divisions” of joint rates between common carriers operating a “through route.” (Rec., pp. 17, 18.)

In the case of nonproprietary lumber traffic if it amounted to a line haul, division of the lumber rate could be allowed. The Commission reserved the right to supervise these divisions on nonproprietary traffic in order to prevent a main line from making unusually large allowances to tap lines as an inducement to the proprietary companies to give the line carrier their own lumber traffic.

It is difficult to see how the Commission could have more carefully guarded the whole situation and cut out the *evils that existed* "*demanding correction.*" The large proprietary mills are all located on the main lines of railroad and are connected with main lines by switch connections. So far as the lumber traffic is concerned, therefore, the only service which the tap line could perform for the proprietary lumber companies was to switch the cars from the mill to the main line and to place the empties at the mill—excluding unnecessary back hauls. If, as stated by the Commerce Court, a tap line may be a common carrier as to some traffic while it is a plant facility as to other traffic, then it was within the power of the Commission to say that as to nonproprietary traffic *where there was a line lumber haul by the tap line* a reasonable division might be made on such traffic.

But the Commerce Court says:

When these tap lines, * * * take the carloads of finished lumber at the mills *for the purpose of either hauling or switching them to a trunk line* so that they may reach their

ultimate destination beyond the State, *the interstate transportation has actually begun.*

That is to say the switching is a part of a through route and the tap line is entitled to a division of the rate.

This is contrary to the cases cited, which hold that the shipper must deliver his traffic to the line carrier, or as expressed in some of the cases "*must bring his traffic to the highway.*" Because the statute requires this service on a private siding to be performed by a carrier it does not make it any the less a shipper's delivery. For the purposes of the statute—*that is, for the purpose of regulation*—the whole service is within the statutory term "transportation." Nevertheless the switching is for the shipper to perform or pay for, unless it may be properly absorbed by the line carrier. While it is a way of stating it to say that the line rate "extends to the mill" it is not technically a correct statement. The *line rate* only extends to the point where the carrier receives the shipment *for TRANSPORTATION* to destination. If the carrier absorbs a service beyond that point it is not, properly speaking, an extension of the rate to the mill. This is not an artificial construction or definition, for if absorption works discrimination the carrier may not absorb the service, but must charge for it. This the carrier could not do if the *line rate* "*extended to the mill.*" But where the switching is recognized as a service additional to the line haul it may be freely treated either by absorbing it or charging for it, as the particular case justifies.

The Commerce Court therefore erred in holding that the refusal to give a "division" of the line rate for a switching service was arbitrary.

In treating the log haul from the forest to the mill the Commerce Court says:

The hauling, it is true, is primarily for the benefit of the mill; consignee and consignor are one. If the service had continued to be what it originally was in most of these cases, by a private carrier for the one industry alone or from the forests to the directly adjacent mills, forest and mill being in fact one entire plant, so that the haul was interindustrial, it might well be held to be a plant-facility service.

* * * * *

The Commission might have limited the blanket rate to the lumber either directly or by forbidding milling in transit. This, however, was not done.

* * * * *

** * * that other mills must haul their logs by team to the tap line or must purchase them in the open market, and that thereby these proprietary mills have great commercial advantages over their competitors does not in any manner affect the matters now before us. (Rec., pp. 209, 210, 211.)*

In short, if a common carrier at a given place wholly absorbs a log haul for big shippers, the fact that other shippers are compelled to perform these services for themselves "*does not in any manner affect*" the case. This is contrary to the doctrine stated in *Wight v. U. S.*, *supra*.

The Commerce Court absolutely ignores the character of this milling-in-transit privilege as practiced on the tap lines. The direct advantage to the proprietary mills in having the haul of their logs to the mill paid for by an allowance from the lumber rate is not referred to. In the illustration which we have already given it clearly appears that the proprietary company under this peculiar milling-in-transit privilege is entirely relieved from any expense in hauling logs. This expense is paid for by an allowance out of the lumber rate. The non-proprietary mills pay something for the log haul although it is not a part of the through rate. The Commerce Court erred in its conclusion that—

as the actual service rendered by the tap line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and nonproprietary mills, and as this is held to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

The Commerce Court deems it unnecessary to consider the evidence as to each petitioning tap line separately. It decides the case wholly "on a disregard by the Commission of the very criteria which it adopts to determine the ultimate facts or on the adoption of distinctions without real differences," and concludes as follows:

It follows, therefore, that the Commission was not only without power to forbid any allowance whatsoever to be made by a trunk

line to the petitioning proprietary industries for switching either less than 1,000 feet or more than 3 miles, but it was also without power to prohibit the making of joint rates by the trunk lines and the petitioning tap lines and the payment by the former to the latter of some division thereof for its services in hauling logs to and lumber from the petitioning proprietary mills, and its order must to this extent and as to these petitioners be annulled. (Rec., p. 212.)

CONCLUSION.

While the Commerce Court states that there are very great evils existing which demand correction in these cases, and that it is within the power of the Commission to prevent this rebating and discrimination, it practically ties the hands of the Commission. If this opinion be the law then there is *in fact* no remedy for the evils, the rebating and the discriminations, which admittedly exist in these cases. The only way in which these evils can be eradicated is by prohibiting the practices which result in rebating and discrimination.

The owners of these tap lines are not in the railroad business as a business. They are lumbermen with logging roads as a part of their plant facilities. If by doing a little outside common carriage business they can secure a half million dollars in rebates upon their lumber rates, and the Commission is without power to prohibit this thing, then rebating is legalized so long as the interests of lumber merchants induce them to dabble a little in railroading.

We respectfully submit that the position of the Commerce Court is inconsistent in holding: (1) That there was evidence sufficient to warrant the Commission in finding that these tap lines were not *bona fide* common carriers, and almost in the next sentence saying, that it is *arbitrary* to hold that they are plant facilities as to their own traffic if they are common carriers as to outside traffic; (2) That as the Commission referred to switching as "transportation" under the statute, therefore it must be held that switching is a part of the line haul, and the tap lines are entitled to through routes and joint rates for a switching service; (3) That as the Commission recognized that the transportation of logs with a true milling-in-transit privilege—a *bona fide* charge for the log haul—is legitimate, therefore, a milling-in-transit privilege without a charge for the log haul *must be legitimate*. These several positions taken by the Commerce Court seem to be not only inconsistent, but an unnecessary application of technical construction to certain words in the Commission's report. Though not intentional, the result is to protect an existing evil of large dimensions and widely extended practice, and to cripple the powers of the Commission as a regulating body.

The importance and far-reaching effect of the decision in this case can not be easily overstated. These are in a sense test cases involving definitions of the "line haul" for which the line rate is charged; a switching service, as distinguished from the line haul, for which

additional charges may be made; and milling-in-transit as practiced by tap lines, which results in casting upon the carrier a part of the expense of a shipper's business. The practices condemned in these cases result in very serious depletion of railway revenues, and cast upon the general public a burden which belongs to individual and favored shippers.

They create grave discrimination between shippers and give to favored shippers undue preferences. The extent of these allowances—and this means cash out of the carrier's treasury—is stated by the Commission in its report in this case (p. 2):

The aggregate amount so paid by the regular lines to industrial lines throughout the country is not known. It has been estimated at no less than \$100,000,000 a year. On the basis of such investigations as we have been able to make it seems entirely conservative to say that they amount, for the whole country, to not less than \$50,000,000 or \$60,000,000 a year.

In Industrial Railways Case No. 4181, decided by the Commission January 20, 1914 (not yet bound. Copies for the use of the court are filed herewith), the Commission said:

The allowances so paid and the free services so performed involve in the aggregate an immense expenditure for which the carriers must necessarily be reimbursed through the rates exacted on the traffic of the general public; at the same time it must be noted, the allowances and free services so paid and performed by the

carriers relieve the particular industries of a large burden of expense which the industries themselves would otherwise have to meet as a part of their manufacturing cost. This operates as a discrimination against the smaller competitors of the favored concerns because, in the nature of things, the benefit of such allowances and free services can be enjoyed only by the larger industrial establishments with plant railways.

Citing special cases the Commission said:

Allowances.—During the year ending June 30, 1912, the Pennsylvania Railroad paid \$1,019,910.41 in divisions out of the rate to only 10 such industrial railways connected with steel plants; the New York Central's western lines paid to 12 such industrial railways an aggregate of \$660,057.93; the Baltimore & Ohio paid to 13 such industrial railways the sum of \$530,317.06.

* * * * *

Free services.—During the year ending June 30, 1911, the railroads performed for a single steel industry, the Republic Iron & Steel Company, at Youngstown, Ohio, free spotting services for 75,134 cars at a cost to the railroads of \$104,329.62, or \$1.40 per car.

It is essential in dealing with these practices that the Commission determine, where the evidence warrants the conclusion, that the tap line or industrial railway is a plant facility as to the proprietary traffic, although it may be at the same time, a common carrier as to some outside traffic.

We respectfully submit that the decision of the Commerce Court should be reversed; that the doctrines herein expressed regarding the extent of the line haul, the character of a switching service on a private siding, and the unlawfulness of absorption of log hauls, should be sustained.

As the Commerce Court declined to discuss the evidence in regard to the particular tap lines we have not referred to it in the brief, but attach an appendix giving a statement regarding each tap line and lumber company. We also submit herewith under a separate cover maps showing the four tap lines as they now exist and as they existed at the time of incorporation.

Respectfully submitted.

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APPENDIX.

THE APPELLEE TAP LINES AND LUMBER COMPANIES.

No. 829.

The Louisiana and Pacific Railway Company and four lumber companies, named as petitioners in this case, are owned and controlled by R. A. Long. He owns 70 per cent of the stock in each company, and the remaining 30 per cent is held by his associates and agents. The tap line company was a party before the commission in the tap line case, and the evidence submitted by it at the hearings before the Interstate Commerce Commission is found in volume 1 of the printed evidence in this case, beginning at page 636 of the record. The exhibits submitted to the commission and referred to are found in the transcript of record in this number. The findings of the commission regarding this company are set forth on pages 591 to 594, inclusive, of the supplemental report. (Rec. p. 111.)

Mr. Sweet, an associate and officer in all the companies of the "R. A. Long interests," who has been connected with these interests for 27 years, and other officials describe the lumber companies, the tap line, and the lumber business. From this evidence (Rec., pp. 636 to 738), the contracts and the annual reports of the railroad companies,

in evidence before the commission, the following facts are taken:

1. The Hudson River Lumber Co. was organized in 1898; its mill is located at De Ridder, within about 1,200 feet of the Kansas City Southern Railroad. It was the first lumber company located at De Ridder; a switch track connected its mill with the railroad, which was operated without charge by the Kansas City Southern. The lumber company built a logging road, afterwards called the De Ridder & Eastern. It built the logging road from its mill into the forest, and operated it without incorporation. In 1904 it incorporated the Louisiana and Pacific Railway Co., which took over the logging road. The operation of this logging road and the loading lumber at the mill were a part of the *main* manufacturing business carried on by the lumber company.

2. The King-Ryder Lumber Co. commenced business in 1891; its mill is located on the Kansas City Southern at Bon Ami. A switch connection was put in between the mill and the railroad, and operated without charge by the Kansas City Southern. The lumber company built a logging road from its mill into the timber and extended it as the timber was cut off. The operation of the logging road and the loading of the lumber upon the cars on the switch were performed by the lumber company as a part of its business.

3. The Calcasieu Long Leaf Lumber Co. is a successor to the Bradley-Ramsey Lumber Co.

Its mill is located at Lake Charles. It had a track connection with the Kansas City Southern at Lake Charles, which was operated by the main line. Now it also connects at Lake Charles with the Louisiana & Western, a part of the Southern Pacific System, and with the St. Louis, Iron Mountain & Southern Railway. All switching was done by the main-line roads without expense to the lumber company up to the time of the organization of the tap line. The forests of this lumber company are located at Camp Curtis, about 31 miles from the mill. A narrow-gauge logging road was constructed by the Bradley-Ramsey Lumber Co. from a point at Lake Charles (point marked Gosport) north to a point shown on the map as Fayette, thence east to Camp Curtis. Logs were floated from Gosport to the mill. This logging road was operated by the lumber company as a part of its manufacturing business, and it loaded the lumber upon the cars at its mill. The Bradley-Ramsey Lumber Co., together with its logging road, was purchased by the Long interests in 1905.

4. The Longville Lumber Co. was organized in and has its timber tracts near Vandercook. A logging road was constructed from its timber tract to its mill at Longville; the mill is located on the Lake Charles & Northern Railway, constructed, owned, and operated by the Southern Pacific system.

5. The Long-Bell Lumber Co. is a selling agent for the R. A. Long interests; it does not manufacture lumber.

6. The tap line, the Louisiana & Pacific Railway Co., was originally incorporated June 6, 1904. The objects for which the company was organized, as stated in its charter, are:

To construct, maintain, and operate, or to lease and operate, a railroad commencing at Bon Ami, Calcasieu Parish, State of Louisiana, in an easterly direction through Bon Ami Junction, in said parish and State; to lease and operate railway and steamships as common carriers of freight.

The charter was amended March 12, 1907, "to acquire, construct, maintain, and operate a railroad or railroads, and branches thereof, in the State of Louisiana, as a common carrier of freight and passengers; etc."

The authorized capital stock is \$200,000, of which only \$51,000 has been issued, \$20,000 as a dividend to stockholders, and \$31,000, it is stated, was issued for cash. The stock is held by the R. A. Long interests in substantially the same proportion as the stock of the lumber companies, namely, 70 per cent by R. A. Long and 30 per cent by his associates and agents. The tap line has a bonded debt of \$582,200, created to pay notes given to the lumber companies in payment for their logging roads.

In October, 1906, Mr. Long started a scheme which the witness, Davis, describes as "an effort to find other outlets for his tonnage" (Rec., p. 654) and,

Mr. Sweet says, to "secure more money from the railroads." (Rec., p. 753.) Mr. Davis says:

Before Mr. Long started south with his property he organized the Louisiana & Pacific Railway, taking over the De Ridder & Eastern road, which was running at that time between Bundicks and De Ridder. Also the line of the Louisiana & Pacific running from Bon Ami out to Walla. Those two lines were in existence at the time. He had this Lake Charles & Leesville road, which was a narrow-gauge line, which had just been purchased, running from a point on the Calcasieu River north over toward Camp Curtis. Those three roads were taken over by this company, and, as he stated, this extension south was started when these negotiations with the Southern Pacific people were entered into. Mr. Harriman wanted a line north and Mr. Long wanted a line south. (Rec., pp. 654-655.)

Evidently the witness is mistaken as to the time these roads were taken over. He has in mind the fact that the roads were taken over during the period of what is termed "the reorganization" of the Louisiana & Pacific Railway Co. This company filed its first report with the Interstate Commerce Commission October 21, 1905, for the year ending June 30, 1905. Under the head "Property operated" (p. 9) it gave the mileage of the line, 1 mile; "spurs," $1\frac{1}{2}$ miles; line operated under trackage right, 10 miles; total, $12\frac{1}{2}$ miles.

In its report filed October 6, 1906, for the year ending June 30, 1906 (p. 9), the same mileage is given.

October 4, 1907, it filed its report for the year ending June 30, and reports, without giving details, 26 miles of railroad from De Ridder, La., to Fulton, La. On page 53 statements called for are answered as follows:

1. All extensions of road put in operation? Answer: Twenty-six miles.

2. Decrease in mileage, etc.? Answer: None.

3. All other important physical changes? Answer: None.

4. All leases taken or surrendered? Answer (p. 53): Lease of equipment and trackage rights with King-Ryder Lumber Co., canceled. New leases made with Calcasieu Long Leaf Lumber Co., Hudson River Lumber Co., and King-Ryder Lumber Co., granting use of equipment and trackage rights.

Under explanatory remarks it states: "The 61 miles of branches and spurs were not operated by the Louisiana & Pacific Ry. Co., but by lessees named on page 53."

There is no increase in capitalization, and under "Explanatory remarks" it is stated: "The capitalization per mile, shown as \$345, is small, considering the recent development of the property. When the Louisiana & Pacific Railway Co. was organized and unincorporated, the capitalization of \$30,000 was thought entirely adequate for all future developments. When

later the line was extended, no change was made in the capitalization, because it could not be determined just what amount of capital would be required and it was possible to make loans sufficient to carry on the development."

In the annual report, filed with the commission October 25, 1908, under the heading "Roads operated" (p. 13) it gives the following:

Main line, De Ridder Junction to Bundicks, 8 miles; Lilly Junction to Walla, La., 7.4 miles; Fayette to Camp Curtis, 9.4 miles; Milepost 38 to Banks, La., 2.5 miles; total mileage owned, 27.3 miles. Line operated under trackage rights, Lake Charles & Northern Pacific Railway Co., De Ridder, La., to Milepost 38, 38 miles under trackage right.

Total owned and trackage, 65.3 miles.

Under "Funded debt," an explanatory remark reads:

This \$362,549.57 represents our indebtedness to several companies in the acquirement of track material and equipment. These notes call for interest at rate of 6 per cent per annum from date, but do not specify interest payable annually and the interest has not been paid on accrual.

It clearly appears from these reports that at the time the contracts for divisions were made, October, 1906, this railroad company did not have any railway excepting the 2½ miles of track and "spurs" and the lease of the King-Ryder Lumber Co.'s logging road. To get the full record of this "reorganization" we must now examine the contracts filed as exhibits. The first is with the Southern Pacific (Rec., pp. 188

to 191), dated October 31, 1906. This contract is signed by the Louisiana Western Railway Co. for the Southern Pacific Co. (first party), the Louisiana & Pacific Railway Co. (second party), and by the four lumber companies (third party). The contract recites that the Louisiana Western Railroad Co. is controlled by and constitutes a part of the Southern Pacific System; after other recitals it agrees in substance:

(1) That during the existence of the agreement the railroads "will interchange business with each other at said point of connection of their respective lines—that is, Lake Charles, La."—on the basis of a division of rates as herein set forth.

(2) That the lumber companies, during each and every month until the expiration of the agreement, will ship over the Southern Pacific, via the connection at Lakes Charles, "at least 40 per cent" of the aggregate products of their mills.

(4) That the two railroad companies will enter into joint arrangements and file the same with the Interstate Commerce Commission.

(5) The lumber companies agree that the Louisiana & Pacific Railway Co. may route their traffic so as to give the Southern Pacific system such haul as shall yield it the largest revenue.

(6) That in respect to the division of freight rates during the existence of this

agreement, the Louisiana & Pacific Railway shall be paid 4 cents per 100 pounds on the products of said mills shipped during the term of the agreement, excepting export business, division of which is to be fixed in the future agreement.

(7) The said party of the first part agrees that it will at all times during the existence of this agreement publish for all points mentioned in its tariff the same freight rates on all products of the parties of the third part from all points on the line of railways of the said party of the second part as are or shall be in effect from Lake Charles, La., on the line of the said party of the first part, which rates shall at all times during the existence of this agreement be competitive with rates from other points in Calcasieu Parish producing yellow pine to all destinations to which the party of the first part may be able to arrange through rates.

(11) This agreement shall commence and become effective on the date hereof, and shall be and remain in full force and effect for the period of 20 years thereafter, *or so long as the parties of the third part shall operate their mills along the line of railway of said party of the second part.*

It will be observed that this contract was made before the Louisiana & Pacific Railway Co. had any railroad in existence between De Ridder and Lake Charles; the contract was in fact a contract with the lumber companies. Their mills were then connected

with the Southern Pacific at Lake Charles, by switches and over the Kansas City Southern Railway.

In connection with this contract a corporation was organized October 30, 1906, called Lake Charles & Northern; the capital stock was taken and is now held by the Southern Pacific Railway Co. This railroad was opened for business October 25, 1908. (Poor's Manual (1913), p. 1460.) The Southern Pacific contract was executed the day after this company was incorporated. On the same day—October 31, 1906—a contract was executed by this newborn railroad company. This contract recites that the Louisiana & Pacific—

is the owner of a line of railway from De Ridder, La., to a certain point on the Calcasieu River * * *. That part of said line of road lying between Ramsay Junction and said point on Calcasieu River has been completed, but is a narrow-gauge road. Of the remainder of said line of road—that is, that portion lying between De Ridder and Ramsay Junction—a portion has been completed and the other portion is now being constructed.

The said party of the first part also owns a right of way for a railroad from Lake Charles to a point on said narrow-gauge road near the northeast corner of section 32, township * * *.

The said second party [just organized] desires to purchase said first party's line of road from De Ridder to said point on the Calcasieu River and said right of way from Lake Charles

to the junction with said narrow-gauge road in said section 32; and said first party is willing to sell its said road and said right of way, on condition that it can have the joint use of said line of road from De Ridder to Lake Charles, which condition is not objectionable to said second party.

The purchase price is \$15,000 for the narrow-gauge road, or "cost to be ascertained by reference to the books of said party of the first part, *and the cost of balance of the road to be verified by the engineers of the parties hereto.*"

The purchase price is to be paid, \$90,000 *upon the execution of the contract*, and the balance "*monthly as the work of construction progresses on estimates* to be furnished by said first party and verified by engineers of the party of the second part, the final amount to be ascertained from the records of the first party by the engineers of both parties."

The contract includes payment to the Louisiana & Pacific Railway Co. for the narrow-gauge road, and the cost of all right of way owned or to be obtained between De Ridder and Lake Charles, structures of every kind existing or to be constructed, making a complete railroad between points; in addition, the Southern Pacific agrees to reconstruct the narrow-gauge road at its own expense, changing it to a standard gauge, but allowing the narrow gauge to remain for the use of the Calcasieu Long Leaf Lumber Co. during the period of reconstruction, and the rails on

the narrow-gauge road are retained by the Louisiana & Pacific.

It is then provided:

Immediately upon the conveyance by said first party to said second party of the property herein contracted to be sold, the said second party shall execute and deliver to said first party a contract, giving said first party joint-trackage rights over the entire line of railroad above mentioned, * * *

Said trackage agreement shall vest in said first party trackage rights over the said line of railroad from De Ridder to Lake Charles, with all the appurtenances thereto, for a period of 20 years from the date of this contract, for such trains as said first party may desire to operate over said road, provided that the number of trains operated by said first party over said line of railroad shall not materially interfere with the operation of trains by said second party.

* * * and for the use of said railroad as aforesaid, said first party shall pay to said second party a rental equal to 25 cents per train-mile for every train that shall be run over said road by said first party during the existence of this contract. * * *

Payments of rental shall be made monthly and on or before the 10th day of each month.

The term "train" as used in the provisions of this contract shall at all times be considered and construed to mean an engine pulling one or more cars of any kind, except an engine pulling a wrecking outfit, and no charge shall

be made for any engine running over said road when not pulling one or more cars.

The mileage for which said first party shall be required to pay shall not include the movements of trains within the switching limits of any station, in placing cars or doing other similar work, nor shall it include the moving of logging trains over that part of said line between De Ridder and the junction of the De Ridder branch, which is about three-quarters of a mile in length, or the movements of logging trains over that portion of said line lying between Bonami and the junction of the Bonami branch. Map hereto attached and made part hereof will more fully define the limits referred to.

The contract provides that the Southern Pacific is to pay the cost of maintenance during the period of 20 years and put in and maintain "such sidings as may be reasonably necessary whenever a new mill may be built contiguous to said line of railroad."

The said first party shall have the right to connect said line of railroad over which it is to have trackage rights with any logging railroad or railroads that it may see proper to build at any time during the said 20 years from any point on said line to serve any near-by lumber mills.

This agreement, with all things pertaining thereto, is entered into on the faith of the consummation and performance of a certain agreement of October 31, 1906, between the Louisiana Western Railroad Co., the said Louisiana

& Pacific Railway Co., the Hudson River Lumber Co., the King-Ryder Lumber Co., the Calcasieu Long Leaf Lumber Co., and the Long-Bell Lumber Co., for division of freights on joint business and for a routing of a proportion of the products of said lumber companies as provided in said agreement.

In reference to these contracts Mr. Sweet, an associate of Mr. Long and an official in all these companies, says:

"I made at the time of the sale a traffic arrangement, not with the Lake Charles & Northern, *but with the Southern Pacific interests*, and one contract hangs on the other."

THE FRISCO CONTRACT.

(Transcript p. 69.)

Before going to the Southern Pacific, Mr. Long had made a very remarkable contract with the St. Louis & San Francisco Railroad Company. This contract is dated October 13, 1906, and is found upon pages 191 to 198, inclusive, of the record. The four lumber companies are parties to this contract. It contemplates the construction of roads to make a connection that would enable the lumber companies to ship their products over their tap line to the Frisco, and in contemplation of this connection it was agreed that the Frisco should receive 50 per cent of all the products of the mills and allow the Louisiana & Pacific Railway Company "thirty-five per centum (35%) of the through rate,

with a maximum of $5\frac{1}{2}$ cents per hundred pounds" on lumber. There are other matters in this contract which might be commented upon, but it is sufficient, for the purpose of this argument, to say that, armed with this agreement, Mr. Long was enabled, on the 31st of October, to make an arrangement with the Southern Pacific Railway Company by which that company undertook the building of the railroad which the lumber companies, under the Frisco contract, were obligated to build, making a junction with the Frisco road (afterwards built) at Fulton.

THE SOUTHERN PACIFIC.

The Lake Charles & Northern Railway *was constructed after these contracts were executed*. It was wholly paid for by the Southern Pacific, on monthly estimates, as it was constructed. (See contract and annual reports to Commission.) It was opened for business October 25, 1908, two years after the contracts were made. It connects with the mills of the Hudson River Lumber Company at De Ridder Junction and with the King-Ryder Lumber Company at Bon Ami. The connection with the mill of the Calcasieu Lumber Company is at Lake Charles. The Southern Pacific *is operating this road and can receive the products of all these mills on its line from the switch tracks*. Under the custom prevailing in this lumber belt, all switching is done from the mill to the main track by the main-line roads without charge. These lumber companies, therefore, can deliver their lumber, without

charge, from their mills to the Southern Pacific and have it transported to all points at the lumber rate, from De Ridder and Lake Charles.

Prior to the construction of this road, and at the time these remarkable contracts were made, the mills at De Ridder and Bon Ami were connected with the Kansas City Southern Railway, and the Kansas City Southern connected at Lake Charles with the Louisiana Western and the Iron Mountain Railroads. These mills, therefore, had, or could have secured under the provisions of sections 1 and 15 of the act to regulate commerce, through routes from these mills, at the published lumber rates, over all the roads named. It appears from the evidence that no through routes had been established over the Kansas City Southern from De Ridder to the lines with which it made connection at Lake Charles, but such through routes could have been compelled by an application to the Interstate Commerce Commission, if these shippers required that service. The Calcasieu Lumber Company at Lake Charles was within the switching limits of each one of the railroads named.

In view of the foregoing facts, it seems remarkable that a railroad should have been projected from Lake Charles to De Ridder for the purpose of serving the public. But admitting that it was necessary, it was entirely unnecessary that two railroad companies should operate over this line. If the Southern Pacific was to operate, as it does, between Lake Charles and De Ridder, there was no reason, from the public stand-

point, why this other company, the Louisiana & Pacific, which runs only to the lumber camps of the Long lumber companies, should also operate over the same track. The reasons for this arrangement are to be found in the desire of the lumber companies to secure a concession from the published rates on lumber from their mills to the markets, or, as Mr. Sweet puts it, "to get more money out of the railroads." They could have secured the through routes to all points reached by any of these railroads at the rate prevailing upon lumber, which was the same from De Ridder as it was from Lake Charles, through their switch connection with the Kansas City Southern and the other roads at Lake Charles. But this did not satisfy the lumber companies; they wanted to "*sell their traffic.*" It was only by a scheme of this kind, and through an agency created by them, that a large concession could be secured from the published rates.

For a less proportion of the through rate, the Southern Pacific could have secured connection with the mills over the existing line of the Kansas City Southern. The Frisco road was afterwards built and connects at De Quincy with the Kansas City Southern. A through route could have been secured from De Ridder over the Kansas City Southern to points on the Frisco. It can hardly be presumed that the portion of the rate to the Kansas City Southern for hauling the traffic from De Ridder to De Quincy, or from Lake Charles to De Quincy, would have been 35 per cent

of the through rate, with a maximum of $5\frac{1}{2}$ cents per 100 pounds. Nor can it be supposed that the portion of the Kansas City Southern for hauling from De Ridder to Lake Charles and transferring to the Southern Pacific would have been as much as 4 cents per 100 pounds. But with the division of through rates over these lines the mills were not concerned. They wanted to sell their traffic for the largest possible concession from the lumber rate.

LOSSES TO THE SOUTHERN PACIFIC.

The maintenance, under the contracts with the Long lumber interests, of the Lake Charles & Northern Railway has resulted in a large annual loss to the Southern Pacific. The reports of the Lake Charles & Northern Railway Company, filed with the Interstate Commerce Commission, show that in 1909 the net corporate losses in the operation of that road from Lake Charles to De Ridder were \$23,928.61; in 1910, \$6,190.61; in 1911, \$19,110.36; and in 1912, \$27,713.01. (See certified copies of reports.) These are actual cash losses. In addition, the Southern Pacific permits, without charge, certain log hauls over this road by the Louisiana & Pacific Company. The rent collected from the Louisiana & Pacific at the rate of 25 cents per train-mile for specified traffic is at least one-fifth of what would be regarded as a fair rental.

ADVANTAGES TO THE LOUISIANA & PACIFIC.

Assuming that there was a reason for the existence of the Louisiana & Pacific Railway Company other than as a plant facility in hauling logs, and that it was

necessary for it to build and maintain a road from De Ridder to Lake Charles, the advantages of this agreement, by which the Southern Pacific built and is required to maintain at its own expense this line of road, may be stated as follows:

[Figures taken from the annual reports of the Lake Charles & Northern Railway Company and Louisiana & Pacific Railway Company, with the exception of the "5 per cent return upon investment." Copies on file.]

	Fiscal years ended June 30—			
	1909	1910	1911	1912
Property investment of Lake Charles & Northern R. R. Co.....	\$833,898.94	\$883,674.81	\$894,134.35	\$900,168.02
Less value of equipment.....	21,900.00	21,900.00	29,866.00	29,645.50
Value of property in joint use.....	811,988.94	861,774.81	864,268.35	870,522.52
5 per cent return upon investment in joint use.....	40,359.45	43,088.74	43,213.42	43,526.13
Maintenance of way and structures expenses.....	12,489.97	21,916.64	38,061.79	33,873.05
Transportation expenses:				
Superintendence.....	1,510.13	2,429.43	3,338.83	3,876.83
Dispatching trains.....	1,001.60	1,500.00	1,300.02	732.24
Station employees.....	5,249.52	7,859.01	9,652.41	9,751.75
Station supplies and expenses.....	218.87	270.02	619.03	474.34
Water for road locomotives.....	316.00	806.25	1,227.53	1,278.92
Drawbridge operation.....	1,075.39	1,373.79	1,372.43	1,363.69
Total expenses.....	21,561.48	36,155.14	55,222.04	51,350.82
Total expenses and return on investment.....	62,160.00	79,243.88	98,435.46	94,876.95
Amount paid by L. & P. Ry. for use of facilities of L. C. & N. R. R.....	16,182.57	18,386.84	20,850.32	19,513.63
Advantage to L. & P. Ry. Co. over owning and maintaining the property.....	45,978.36	60,857.04	77,585.14	75,363.32

The foregoing statement assumes that the traffic over the road would be only the traffic carried by the Louisiana & Pacific during the periods covered by the statement. But which ever way it is looked at—from the standpoint of the Southern Pacific losses or from the advantages which the Louisiana & Pacific secures—the concessions to this tap line far exceed any amount that can be explained upon any hypoth-

esis other than that this deal was a flagrant concession to the Long interests to secure 40 per cent of his traffic.

It must be observed that this road, maintained by the Southern Pacific, is also used in part as a logging road for the Calcasieu Lumber Mill, and from Lily Junction to Bon Ami for the King-Ryder Lumber Company, and from De Ridder Junction to De Ridder for the Hudson River Lumber Company.

Next comes the cash concession from the lumber rate. In the testimony taken before the Commission (Rec., p. 660), Commissioner Harlan inquired of Mr. Davis what the 4 cents per hundred pounds amounted to on an ordinary carload, to which Mr. Davis replied "20 dollars a car." One of the mills turned out 2,500 cars a year. This amounts to \$50,000 per annum, applying the 4 cents to the entire output. When we consider that 90 per cent of the entire output of each mill goes either to the Southern Pacific or the Frisco line, and that the allowance from the Frisco is greater than that from the Southern Pacific, the magnitude of this rebate clearly appears.

From the foregoing statement it will be seen that all the lumber mills operated by the several lumber companies in this case are located upon, and can be served directly by, main line railroads. Under the custom prevailing in this timber belt, as found by the commission, the main line railroads absorb the switching service to the mills and apply the

junction rate. There is, therefore, no sound reason why the Louisiana & Pacific Railway Company should operate over the rails of the Southern Pacific in handling lumber. This service of the Louisiana & Pacific does not add in the slightest to the public convenience. It is a burden superimposed by contract upon a main line carrier, and is a mere device to secure a concession from the published rates on lumber applicable to the traffic of these lumber companies. Main line roads, required by law to devote their entire capital to transportation, should not be burdened with a service and traffic which is fictitious and useless. The whole scheme is an unlawful device, to secure a rebate from the published rate on lumber. From the Southern Pacific side it is a "buying" of 40 per cent of the Long lumber traffic.

No. 831.

The Woodworth & Louisiana Central Railway Company, Limited, was chartered in 1900 under the laws of Louisiana, with a capital stock of \$25,000. It took over the logging road of the lumber company, as hereinafter described, at a valuation of \$88,000, for which it gave its notes. These notes are still unpaid, and no interest has been paid upon them. The notes are held by the lumber company. It is a mere agency of the lumber company.

It serves the mill of the Rapides Lumber Company at Woodworth, Louisiana, a station on the Iron Mountain Railroad. The logging road was constructed by

the Rapides Lumber Company and operated as a plant facility for a number of years. It extended some miles from the mill on the Iron Mountain Railroad into the timber lands owned by the mill company, and is used for the purpose of hauling logs from the timber to the mill to be manufactured into lumber. This track is narrow gage, and at present extends about 18 miles to a point from which unincorporated tracks are still operated directly by the lumber company. The right of way for the narrow-gage track is leased from the lumber company, but the track from the mill to a point shown on the map as Hineston is owned by the railroad company. It is operated for the purpose of conveying logs from the forests to the mill, this service being the same as the service originally performed by the mill company. In addition, there is a switch track from the mill at Woodworth to the Iron Mountain Railroad. This switch track was originally put in by the mill under arrangement with the Iron Mountain Railroad Company, and was operated by the Iron Mountain. The Woodworth & Louisiana Central acquired, in exchange for its notes, the interest which the mill had in this switch track, and undertook its operation.

The Woodworth & Louisiana Central, with capital furnished by Mr. Long, constructed a spur standard gage railroad from the mill eastward for six miles to La Moria, Louisiana, connecting with the Southern Pacific, Texas & Pacific, and Rock Island lines. This spur track was constructed for the purpose of conveying

lumber manufactured by the mill company to competing lines of railroad, the purpose, as stated, being to secure competition for their traffic.

The tap line has one standard gage and five narrow gage locomotives. The standard gage locomotive is used for switching the carloads of lumber from the mill to the Iron Mountain Railroad, a distance, as the record before the Commission shows, of twenty-five feet, and for delivering carloads of lumber from the mill to the railroad lines at La Moria, a distance of six miles.

About 95 per cent of the lumber moves through La Moria. The explanation is in the fact that the allowances out of the through rate from the Iron Mountain Railroad run from $1\frac{1}{2}$ to $5\frac{1}{2}$ cents, while the trunk lines connecting at La Moria allow from 2 to $5\frac{1}{2}$ cents. At the time of the hearing before the Commission the record shows that 40,707 tons of freight were handled for the lumber company during the fiscal year ending June 30, 1910, and 2,100 tons of outside traffic consisting of merchandise, farm products, and miscellaneous material, which included supplies carried to the mill and the milling camps. There is no passenger service.

LUMBER COMPANY.

The Rapides Lumber Company was organized and commenced operations many years before the organization of the Woodworth & Louisiana Central Railroad. Its business includes the cutting of timber and the manufacturing and sale of lumber. No logs are

shipped over the main line railroads; only lumber manufactured from the logs is delivered to the main lines for shipment to the markets. As a part of its business, and to cheapen the cost and facilitate business, the mill company constructed the narrow-gage tap line above described for the purpose of conveying the logs from its timberlands to its mill and conveying supplies from Woodworth to its lumber camps. It still continues to operate the narrow-gage road from Hineston into the timber, shown upon the map in yellow lines. At the time of the hearing, and for some time after the order in controversy was entered, the steel for these logging roads into the timber was supplied by the W. & L. Central. Since the hearing this has been changed upon the books of the company. The fact remains, however, that this narrow-gage road is operated precisely as it was operated by the mill company and for the same purpose, and without any money changing hands. The connection between Woodworth and La Moria is used entirely for putting the products of the mill upon the lines of three competing railroads; the line being more than three miles long, it is not a service which, by custom in this territory and in reference to this traffic, is absorbed by the main lines as a part of the service of transportation under the main-line group rate. It consists, therefore, of a plant facility performing a plant service in delivering the products of the mill to competing lines in order to secure greater allowances out of the regular rate and additional car

service. It is just as much a part of the business of the lumber company as it would be if this haul was made by teams. The rails and steam engine decrease the cost of delivery over team service, and are therefore used. It is a business proposition. The question before the Commission was simply whether the "divisions" for this service out of the main-line lumber rate was an unlawful device.

No. 833.

MANSFIELD RAILWAY & TRANSPORTATION COMPANY.

This company was incorporated in 1881 under the laws of Louisiana by the citizens of Mansfield. Two miles of track were constructed from the town of Mansfield to a connection with the Texas & Pacific Railroad at a point known as Mansfield Junction, to serve the town of Mansfield as a freight connection. No passengers are carried over this line, passengers being conveyed by stages.

About 1891, E. A. Frost and associates purchased the entire capital stock of this railway company for \$12,500, and about the same time purchased a large tract of timberland lying west of the line of the Texas & Pacific Railroad. These parties erected a sawmill at a point near Mansfield known as Oak Hill. The timber and the mill were held and operated by a corporation owned by Frost and his associates, known as the De Soto Land & Lumber Company, and the stock of the Mansfield Railway was held by this lumber company. Some six or eight

miles of logging roads were constructed from a connection with the mill into the timber. The Frost Lumber Company was organized and took over the property and business of the De Soto Company.

The tracks into the timber were used solely for conveying logs to the mill, and the mill was connected by switch with the Texas & Pacific Railroad. Lumber was shipped from the mill over this side track or connection, the cars being switched and the service absorbed by the main-line road.

At a point about $1\frac{1}{2}$ miles east of Mansfield a connection is made by a switch with the Kansas City Southern Railway.

In transferring the logging road to the Mansfield Railway & Transportation Company, the lumber company reserved to itself the free privilege of operating logging trains between the timber and the mill. No consideration was allowed for this; the full value of property transferred was exchanged for the outstanding capital stock to the amount of \$77,300, all of which, at the time of the investigation by the Commission, was held by the stockholders of the Frost Lumber Company. The railroad is indebted to the lumber company in the sum of \$216,806.97. The holdings of the stockholders in the Frost-Johnson Company and the tap line are identical.

There is a subsidiary corporation of the Frost-Johnson Company that performs the entire logging service. The lumber company assigned its trackage privilege over the tap line to the logging company. The Mans-

field Railway and Transportation Company owns one locomotive, a passenger coach, and one box car; the logging cars are owned by the subsidiary company that transports the logs.

In addition to the incorporated logging road, there are, in the aggregate, nearly 25 miles of unincorporated logging tracks in the timber.

FROST-JOHNSON LUMBER COMPANY.

As before stated, this corporation has been in existence for some time. It received the stock of the Mansfield Railway & Transportation Company and distributed it to its stockholders. It owns the subsidiary logging company and also the timberlands and mill. The mill is located at Oak Hill, about three-fourths of a mile from the junction with the Kansas City Southern Railroad, and $2\frac{1}{2}$ miles from the point of interchange with the Texas & Pacific Railroad. The mill is within 300 feet of the right of way of the Kansas City Southern, with which it formerly connected by a switch. After the organization of the Mansfield Railway Company, this switch was abandoned, and later taken up and the other connection made. The distance of the lumber movement from the mill to the main lines is (a) to the Kansas City Southern about three-fourths of a mile, and (b) to the Texas & Pacific Railroad about $2\frac{1}{2}$ miles.

Under the custom found by the commission to prevail in this territory the main-line roads absorb the service of switching or moving cars over the side tracks connecting with lumber mills where the

distance does not exceed 3 miles. Under this custom, therefore, the Frost Lumber Company can have its lumber taken from its mill by the Kansas City Southern Railway Company or the Texas & Pacific Railroad Company at the main-line rate; that is, without any switching charge. The Frost-Johnson Company's mill manufactures yellow-pine lumber. There is a hardwood mill adjacent to the mill of the Frost-Johnson Company, operated by the Mansfield Hardwood Lumber Company. This company buys a substantial portion of its timber from the Frost-Johnson Company or its subsidiary logging company. The price paid includes delivery at the hardwood mill. Such logs are hauled to the mill by the logging company under its trackage right in the same manner as the logs are hauled to the Frost-Johnson mill. The hardwood mill also obtains some logs along the Texas & Pacific Railroad, which are brought to the junction by the latter road and switched by the Mansfield Railway & Transportation Company to the mill at a charge of \$2.50 a car.

The original connection with the Kansas City Southern was about 300 feet long. This switch was taken out and a connection about three-fourths of a mile long was substituted. After the latter switch was made an arrangement was effected by which the Kansas City Southern undertook to pay the Mansfield Railway & Transportation Company divisions of 1 to 4 cents per 100 pounds. This was held by the commission to be "a mere manipulation of the

situation in order to establish a relation that is unlawful."

The tap line also crosses the right of way of the Texas & Pacific within a short distance from the mill, but the lumber is switched by the tap line back towards Mansfield, and then to the junction, making the distance $2\frac{1}{2}$ miles; the tap line receives from the Texas & Pacific 1 to 4 cents per 100 pounds.

It will be observed that in both instances the original short switch connections were taken out and longer connections were constructed. The purpose as found by the commission was to compel these main lines to make a greater allowance to the tap line out of the main line rate. This is a plain "device" to secure a rebate.

No. 835.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY.

This railroad was incorporated in November, 1902, under the laws of Louisiana. It is owned by the stockholders of the Louisiana Long Leaf Lumber Company. The railroad and lumber company have the same officers, and the capital stock of the railroad company, amounting to \$300,000, was issued as a dividend to the stockholders of the lumber company in exchange for the tracks and equipment then owned and theretofore operated by the lumber company.

The track of the railroad was constructed some 25 years ago as a logging road and was acquired by the present lumber company in 1900. It connects

with the Texas & Pacific Railroad at Victoria, Louisiana, and runs southward, crossing the Kansas City Southern at Fisher, and terminating at a point known as Cain, a distance of about 31 miles. There are about 25 miles of logging spurs and side tracks operated by the lumber company. The railroad has 5 locomotives, 4 cabooses, 3 box cars, 1 flat car, and 105 logging cars. It does not operate any trains on regular schedule.

The tap line hauls the logs from the woods to the mill, making a charge of \$1.50 per 1,000 feet which, it claims, covers the service performed on the logging spurs, and not on the haul over the main track. The lumber from the mill is switched about one-half mile by the tap line to the Kansas City Southern, and about 1 mile to the Texas & Pacific. It receives divisions out of the main line rates from both railroad companies, ranging from $\frac{3}{4}$ of a cent to 4 cents per 100 pounds, except on traffic moving to points in Texas, where $1\frac{1}{4}$ cents per 100 pounds is added to the junction-point rate.

The tap line does not carry passengers; and more than 99 per cent of the total tonnage for the year 1910 was furnished by the proprietary company.

THE LOUISIANA LONG LEAF LUMBER COMPANY.

This lumber company has two mills, one about a mile from the junction with the Texas & Pacific at Victoria, and another about half a mile from the tracks of the Kansas City Southern at Fisher. The Victoria mill has been in operation for about 25 years, and was

acquired by the present lumber company in 1900. The timber holdings of the company approximate 95,000 acres, in addition to which it owns 80,000 acres of cut-over land. The greater portion of the lumber manufactured at Fisher is delivered to the Kansas City Southern, while the greater part of the lumber produced at the mill at Victoria is delivered to the Texas & Pacific Railroad. A small amount of lumber from each mill moves over the tap line to the more distant trunk line.

The organization of this tap line and its operation did not change the service theretofore rendered; that service was a part of the business operation of the lumber company. It is still a plant or business service. The organization and changes made was a device to secure rebates.

TOTAL LUMBER TONNAGE OVER THESE FOUR TAP LINES.

The evidence before the Commission shows that the lumber tonnage of these several tap lines is as stated below. The carloads are figured on the basis of 25 tons per car.

	Tons.	Equivalent in carloads on a basis of 25 tons per car.
Louisiana & Pacific Ry.....	243,122	9,725
Mansfield Ry. & Transportation Co.....	28,596	1,144
Victoria, Fisher & Western R. R.....	316,416	12,657
Woodworth & Louisiana Central Ry.....	39,773	1,591
Total.....	627,907	25,117

Taking Mr. Davis's statement that the "divisions," under the Southern Pacific contract, would be \$20

a car, and applying that to the whole traffic, it would amount to \$502,340. An average of half that rate would amount to a yearly profit of over a quarter of a million dollars. And this comes out of the lumber rates applicable from the junction points. To the extent of these allowances these Long lumber companies are preferred over their competitors and railroad revenues are that much depleted.

The extent of these practices, the importance of the subject, and the far-reaching effect of the tap-line decision is suggested by the following from the Commission's report (p. 282):

Of the 2,208 industrial lines of all classes that were examined in the course of the general investigation referred to, it was found that some 1,251, incorporated and unincorporated, were tap lines owned by or closely affiliated with companies engaged in different parts of the country in the manufacture of lumber and forest products. Of these so-called railroads only 243 were found to be receiving allowances from the public carriers. On the other hand, 1,008 were receiving no allowances of any kind. The 243 lumber companies that were beneficiaries of such contributions from the public carriers were operating, through their tap lines, 5,787 miles of track, while the tap lines of the 1,008 other mills receiving no aid from the public carriers were operating 12,358 miles of track. These figures fairly lead to the inference that it is the larger lumber companies with their larger traffic that receive allowances, while the

smaller concerns are compelled to get along without such contributions from the public carriers.

These 1,251 lumber mills in different parts of the country are operated under different conditions and manufacture lumber of different kinds and classes. It must be remembered, nevertheless, that they are all in competition with one another in the general lumber markets of the country. But limiting our comments to the conditions that exist west of the Mississippi River in the three States of Arkansas, Texas, and Louisiana, where the lumber industry is confined largely to yellow pine, we find that the public carriers, at the time our investigations were brought to a conclusion, were making allowances out of the rates to 112 tap lines, while 143 tap lines were receiving no such contributions.

QUESTIONS INVESTIGATED.

The investigation by the Commission had in view, and for its purpose, the ascertainment of all evidential facts bearing upon, and the determination from the facts of, the questions—

(1) Whether the giving of these divisions constituted in any case a rebate; and

(2) Whether, in a case where a tap line is a common carrier but wholly owned by a proprietary lumber company, a division with the tap line, upon the traffic of the proprietary lumber company, constituted, in whole or in part, unjust and undue discrimination in favor of the proprietary lumber company and against its competitors in the same field.

5
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Tap Line Cases—Appendix B.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

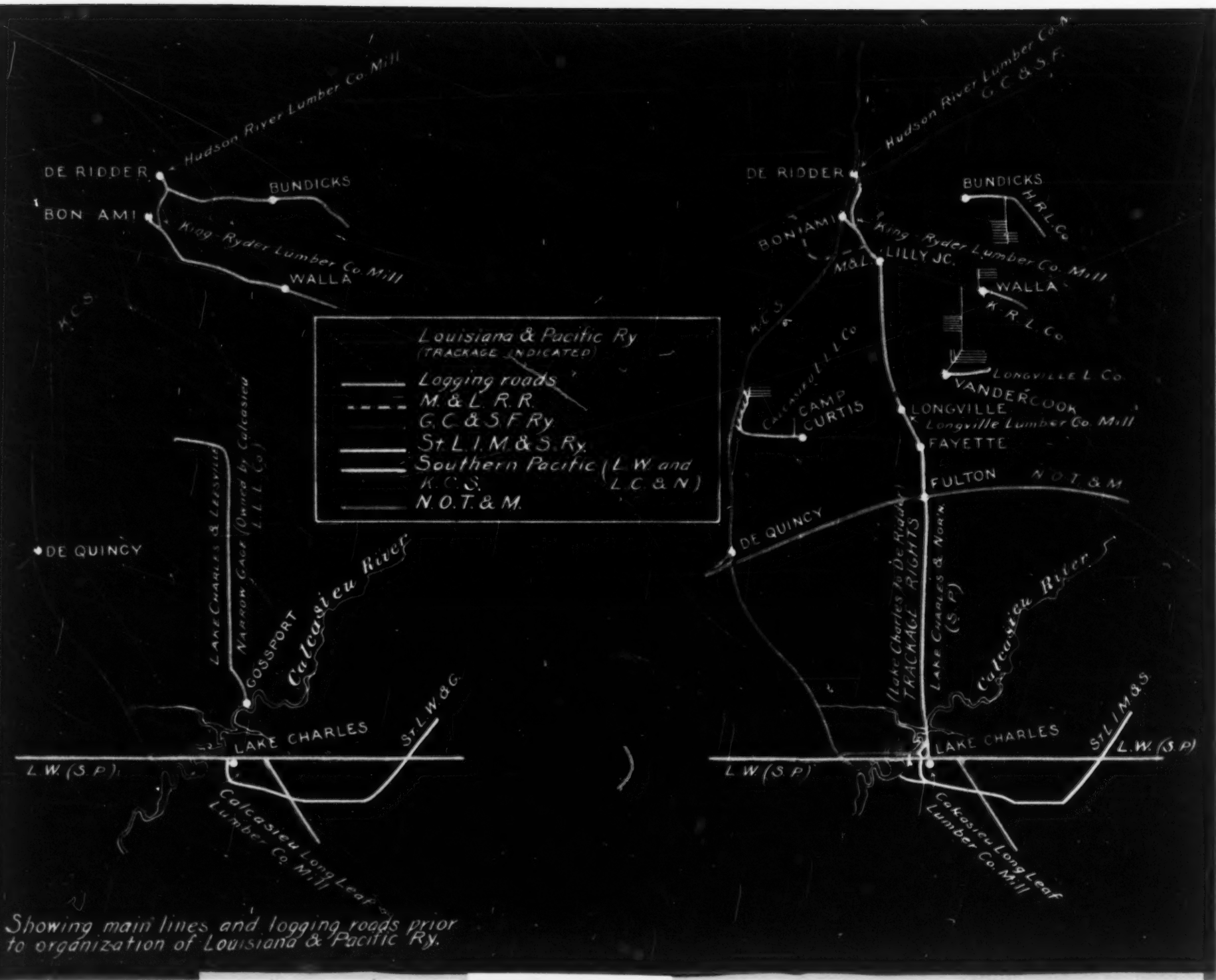
Nos. 829, 831, 833, 835.

APPENDIX B

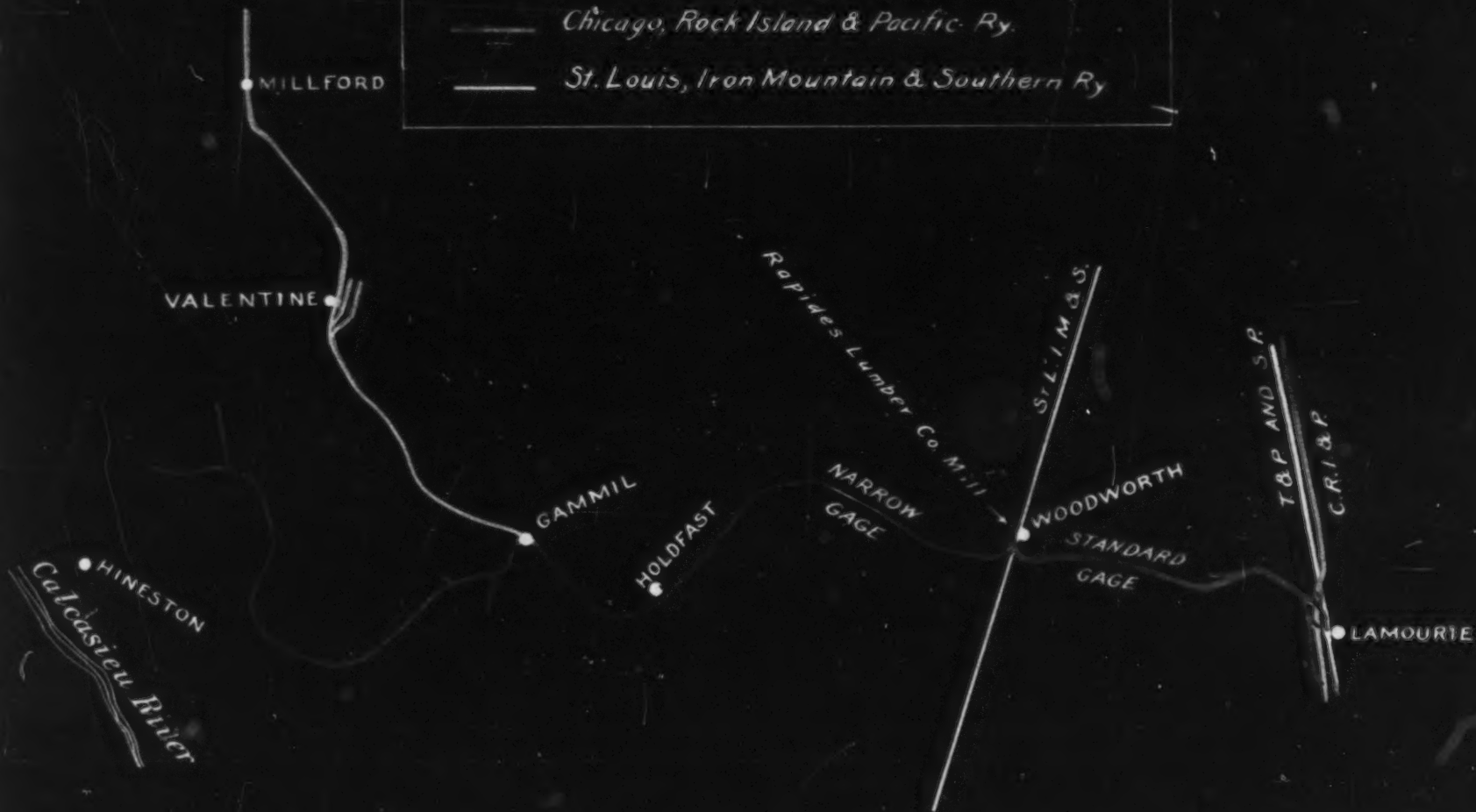
TO THE

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel for Interstate Commerce Commission.



- Woodworth & Louisiana Central Ry.*
- Rapides Lumber Co. track*
- Texas & Pacific and Southern Pacific Rys.*
- Chicago, Rock Island & Pacific Ry.*
- St. Louis, Iron Mountain & Southern Ry.*



Prior to purchase

1905

MANSFIELD



MR & T Co.

MANSFIELD JCT.

T. & P.

K.C.S.

MANSFIELD



OAK HILL

MR & T Co.

MANSFI

Frost-Johnson Lumb

K.C.S.

Present condition

Mansfield Railway & Transportation Co.

Frost-Johnson Lumber Co. track

Texas & Pacific Ry.

Kansas City Southern Ry.



Victoria, Fisher & Western R.R. Co.

Louisiana Long Leaf Lumber Co. track

Texas & Pacific Ry.

Kansas City Southern Ry.



POOR COPY

Victoria, Fisher & Western R. R. Co.

Louisiana Long Leaf Lumber Co. track

Texas & Pacific Ry.

Kansas City Southern Ry.

VICTORIA

*Louisiana Long Leaf
Lumber Co. Mill*

MANY

AIN

K.C.S.

V.F. & W.

FISHER

Leaf Lumber Co. Mill

This is substantially as operated by the Lumber Co prior to 1902.

Substituted Brief

Tap Line Cases.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 829.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,
v.

LOUISIANA & PACIFIC RAILWAY COMPANY ET AL.,
APPELLEES.

No. 831.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,
v.

WOODWORTH & LOUISIANA CENTRAL RAILWAY COM-
PANY (LTD.) ET. AL., APPELLEES.

No. 833.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,
v.

MANSFIELD RAILWAY & TRANSPORTATION COMPANY
ET AL., APPELLEES.

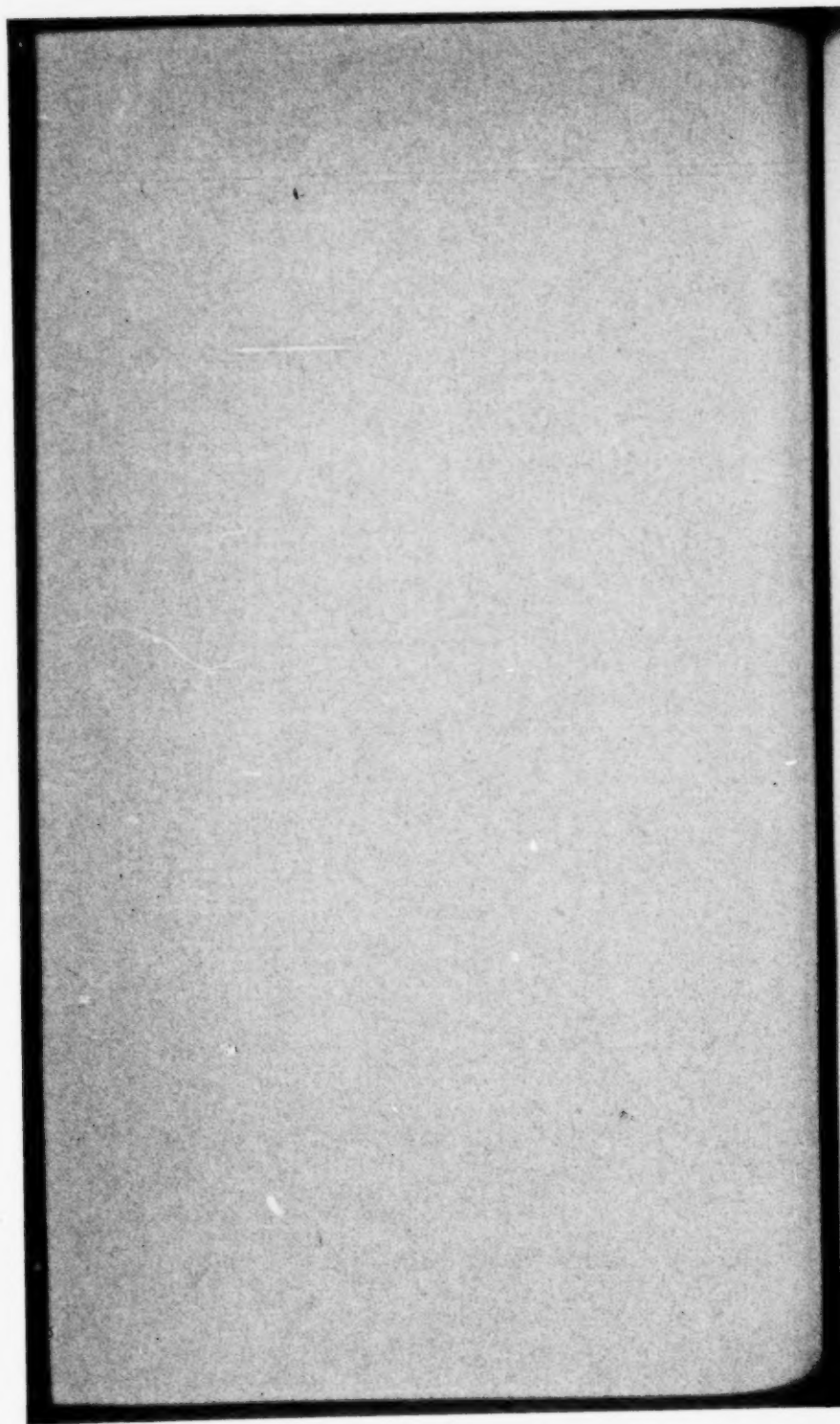
No. 835.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,
v.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY
ET AL., APPELLEES.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.

JOSEPH W. FOLK,
CHARLES W. NEEDHAM,
Counsel.



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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 829.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,

v.

LOUISIANA & PACIFIC RAILWAY COMPANY ET AL.,
APPELLEES.

No. 831.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,

v.

WOODWORTH & LOUISIANA CENTRAL RAILWAY COM-
PANY (LTD.) ET. AL., APPELLEES.

No. 833.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,

v.

MANSFIELD RAILWAY & TRANSPORTATION COMPANY
ET AL., APPELLEES.

No. 835.

UNITED STATES AND INTERSTATE COMMERCE COM-
MISSION, APPELLANTS,

v.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY
ET AL., APPELLEES.

**BRIEF ON BEHALF OF THE INTERSTATE COMMERCE
COMMISSION.**

STATEMENT.

It is reasonably clear from the facts in these cases
that the proprietors of the different tap lines in con-

troversy were receiving rebates from the trunk lines prior to the passage of the Hepburn Act. After the Hepburn Act went into effect the proprietors incorporated the tap lines, and then received in the shape of divisions what before they had gotten as rebates.

The position of the Commission is that there is no magic in a corporate charter to change crime into innocence, and if stripped of its cloak of incorporation the division awarded a tap line is in effect a rebate the Commission may, under the authority to prevent rebating and discrimination given by the act to regulate commerce, make such orders as will stop the abuse. The power given to the Commission with respect to rebating and discriminations it would seem carries with it the authority to pass on divisions between different lines, and if under the facts and circumstances the Commission finds a rebate concealed in a "division" of the through rate it is the right and duty of the Commission under the law to order a discontinuance of the practice bringing about this result.

Whether a line is an industrial or common carrier is of importance only as affecting the question of rates. Being a rate-making question it comes within the exclusive province of the Commission to determine the reasonableness of the division or allowance. (*Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S., 264.)

It was within the administrative functions of the Commission to investigate the facts surrounding

each so-called tap line and the conclusions of the Commission as to facts are not open to review. The determination and investigation of the different conditions surrounding the various tap lines were administrative matters for the Commission to decide.

If the Commission has no power to look through the veil of incorporation of the tap lines, in order to prevent rebating, a plant situated say 4 miles from a trunk line could, by the mere process of incorporating its tap line, secure rebates in the guise of "divisions" with immunity. It is the contention of the Commission that the act to regulate commerce gives it authority to prevent such discriminations, and if it finds that a line is in fact a mere plant facility as to the proprietor it may so declare, even though the same line may incidentally perform the duties of a common carrier as to others than the proprietor.

The Commerce Court held that the Commission could not by its order make a distinction between proprietary traffic and nonproprietary traffic.

POINTS.

1. A tap line is not entitled to a "division" of the through line lumber rate for performing a switching service. Where the carriers absorb the switching service at the points of origin of lumber traffic, the shipper or its tap line may be allowed, under section 15, a reasonable switching charge for performing the switching service.

2. Logs and lumber are distinct commodities, for each of which there is a classification and commodity rate; the cost of transporting logs is a part of the cost of the logs at the sawmill; therefore a log haul performed by a carrier *free of charge* is a consideration to induce the mill owner to give the carrier his lumber traffic at the published lumber rate; such absorption of a distinct service by a carrier is rebating or "buying the traffic."

3. A milling-in-transit privilege which extends the lumber rate, for the lumber line haul, back to the forest and thereby absorbs or obliterates any charge for the log haul, is not a true milling-in-transit privilege and is unlawful.

4. A tap line or industrial road may be so owned, organized, and conducted as to be a plant facility as to the traffic of the proprietary company and a common carrier as to nonproprietary traffic.

5. It is within the powers of the Interstate Commerce Commission, upon full hearing, to determine:

(a) That the practice in a given case of absorbing switching, spur track, and log-haul services in order to secure the shipper's lumber traffic creates undue discrimination, favoritism, and rebating.

(b) That a milling-in-transit privilege which has the purpose and effect of rendering to the shipper a free service in transporting raw material for him, in order to secure the shipper's traffic of manufactured commodities, is unlawful.

(c) That a tap line or industrial road is a plant facility as to the traffic of the proprietary mill, while it may be a common carrier as to nonproprietary traffic.

Order of the Commission.—The four tap lines, appellees above named, are included in the first list of tap lines set forth in the Commission's amended order (Opinions, orders, etc., pp. 179, 180). As to all the tap lines in this list, the order reads:

That the Commission upon the record finds
* * * that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common-carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports;

It is ordered, That the principal defendants, [naming the companies operating the main line railroads] be, and they are hereby, notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above-named parties to the record in respect of any such above-described service.

Commission's report.—In the report which i expressly made a part of the order it is stated (Opinions, orders, etc., pp. 15, 16, 17 and 18):

The notion seems to prevail * * * that a common carrier must be an incorporated company; on the other hand, it is also claimed that a company incorporated as a common carrier is a common carrier in law for all purposes, regardless of all other considerations. This, however, is not a sound view of the matter. * * * That relation to the public may lawfully be sustained, with respect to interstate traffic, by individuals or partnerships or other associations. * * * If there is a holding out as a common carrier for hire, and if there is an ostensible and actual movement of traffic for the public for hire, generally speaking, the status of a common carrier may be said to exist, whether the holding out is by a company or by an individual. * * * Where the holding out is in furtherance of a plan to secure unlawful advantages and the alleged carrier is able to pick up some traffic that is incidental to that purpose, it must be regarded simply as a cloak or device to effect unlawful results. This Commission, in the enforcement of the law, is necessarily bound to ascertain the real purpose and object of the holding out; and in the prevention of preferences and other unlawful consequences it is entitled to and must ascertain the real situation.

* * * * *

It follows from that view of the matter that the common ownership of an industry and of a railroad that is held out as a common carrier and has some actual traffic for the public for hire is not in itself sufficient to divest the railroad of its status as a common carrier. On the other hand, the fact that the rails, locomotives, and cars of an industry have been turned over to an incorporated railroad company, owned and operated by the industry or in its interest, does not divest those appliances of their character as a plant facility if such in fact is the case. * * * We must look at the thing done and scrutinize the manner in which it is done. We must ascertain what is its real relation to the industry. If in such a case the tracks and equipment are a facility of the plant and are so used in the process of manufacture, what is thus done for the controlling industry can not be regarded as a service of transportation. It is clear that a division allowed by a public carrier out of the rate under such circumstances is a rebate to the industry.

* * * *

It is our understanding that in some cases the trunk lines have connected their rails with the mills by constructing spur tracks at their own expense; in other cases they have furnished the rails and the ties and the lumber companies have borne the expense of the grading and construction, and in a number of cases the lumber companies have built the connection entirely at their own cost, either directly or through their tap lines. In some

instances the original spur or switch track built by the trunk line to the mill still remains and could be used; as a matter of fact, however, the tap-line connection subsequently built is actually used. In some cases, where the tap line has connected the mill with the trunk line, the spur track of the trunk line to the mill has been torn up. In some instances the trunk line is still closely connected with the mill by an available switch track, but in order to give the appearance of a real service the tracks of the tap line have been laid parallel to the trunk line to a more distant switch connection.

In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long.

* * * * *

If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company

may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15, whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty. * * *

No allowance, however, ought to be made by a trunk line to a lumber company where the mill is within, say, 1,000 feet of the trunk line. We should regard an allowance under such circumstances as a mere device to effect an unlawful payment to the lumber company. We should take the same view of an allowance where a short switch track to the mill has been torn out or is still available but not used in order to give the appearance of a longer haul to the mill over a spur or switch track constructed by the lumber company or by its tap line.

* * * * *

But where a mill is more than 3 miles distant from a trunk line and is connected with it by a tap line organized as a common carrier and so recognized by this commission, the mill is to be regarded as a shipping point equally with all other mill points in the extensive rate group which the trunk-line carriers have defined in this territory; and the lumber rate is

to be regarded as in effect from the mill, the tap line being entitled to a division thereof according to the extent of its participation in the through service under the through rate.

Opinion of the Commerce Court.—The opinion and judgment of the Commerce Court enjoins and annuls the order of the Commission, in regard to these four tap lines, upon the ground that the power of the Commission was arbitrarily exercised. It holds that no constitutional question arises in the case, and the court does not base its opinion upon the ground that there was no substantial evidence to support the order. The reasoning and the judgment of the Commerce Court is shown by the following extracts from the opinion (opinion begins on p. 185 of the record, Opinions, etc.):

Arbitrary action can, however, be predicated on a disregard by the Commission of the very criteria which it adopts to determine the ultimate questions of fact, or on the adoption of distinctions without real differences.

The important questions, therefore, to be considered by this court are:

First. Whether the Commission acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be acting as a mere plant facility of and performing mere plant service for the proprietary companies; or,

Second. Whether in each of these cases there was substantial evidence to justify the

ultimate findings and the consequent order of
the Commission. (Rec. pp. 194, 195.)

* * * * *

ARGUMENT.

I.

A switching service upon a private siding or spur track is an independent service which precedes or follows a line haul.

Matters to be excluded.—The discussion under this head has reference solely to the movement of cars between the private warehouse or place of business of a shipper and the point on the private siding (free of the line tracks) where connection is made with the main line. We have no reference to the carrier's delivery in shunting cars upon the private sidings free of the main track, or switching between line carriers in a through route, or deliveries upon public team tracks or terminals. We contend that the movement of cars upon private sidings is a shipper's service, taking the place of, and being a substitute for, the truck or team delivery by shippers generally.

Loading and unloading carload traffic.—It is the universal practice for shippers and consignees to load and unload carload shipments. The carrier receives the car loaded from the shipper and delivers it loaded to the consignee. The line haul for which a line rate is charged is between the points of such receipt and delivery by the carrier. All services outside the line haul are additional services for which the carrier may properly claim additional compensation.

Absorption.—We do not contend that a carrier may not absorb this additional service where it does not work undue discrimination or operate as a rebate. This court and the Commission have held that a switching service may be performed without extra charge; that is, may be absorbed by the line carrier. Our contention is that a shipper having a private siding has no right to have this additional service absorbed, and that the Commission may prohibit it where such absorption operates as an undue discrimination against shippers of like traffic who are obliged to deliver their traffic upon public or team tracks. The phrase "*absorbing the service*" means, and is interchangeable with the term, "*free service*."

Switching and its relation to the transportation was clearly defined by the Supreme Court of Georgia.

The test of distinction between "transportation" service, relative to loaded freight cars, for which a railway company can lawfully charge tonnage rates, and "switching" or "transfer" services, for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another, for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway, whereas a switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight

charges have already been earned or are to be earned. (*Syllabus*.)

Dixon v. Central of Georgia Ry. Co. (110 Ga., 173; 35 S. E., 369, 372).

Our act to regulate commerce, as amended June 29, 1906, provides that—

The term "railroad" as used in this act shall include * * * all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, * * * and the term "transportation" shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor.
* * *

Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and *operate upon reasonable terms* a switch connection with any such lateral, branch line of railroad, *or private side track* which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will

furnish sufficient business to justify the construction and maintenance of the same (sec. 1).

When the carrier refuses to furnish these facilities the Commission is authorized to require the same "and shall determine as to the * * * *reasonable compensation* therefor * * *." (Sec. 15.)

Discrimination.—It has been a common practice in this country for the carriers to absorb a switching service at some places and in special cases; to do the switching without making any charge therefor in addition to the line rate. The right of the carrier to do this is not questioned provided such *free service* does not work undue discrimination between shippers or localities. If this practice in any case gives an undue preference and advantage to a shipper or locality the Commission, upon full hearing, may order the practice discontinued.

In *Wight v. United States*, 167 U. S., 512, this court held that an accessorial service allowed to a single shipper was discriminatory because the service was not given to all shippers at that place.

We are not unmindful that this court has said that the law does not undertake to equalize the fortunes or conditions of man. Mere inequality of condition, therefore, does not create the undue discrimination or preference prohibited by the statute. But when the carrier performs for a shipper a service which is accessorial and thereby relieves that particular shipper of a burden which rests upon him, and does not perform the same service for other shippers

at the same place, it is unlawful. This is not equalizing the conditions or fortunes of men; it is simply preventing preferences.

A switching service can not be an integral part of a through route.

These tap lines, therefore, are not entitled to through routes, even if they be *bona fide* common carriers, when the service rendered is nothing more than switching cars of lumber from the mill to the main line. It is not transportation, using that word in the sense of conveyance or line haul; it is bringing the freight to the public highway or line carrier. It can not, therefore, be a segment in a through route.

Here it may be well to observe the difference between the words "allowance" and "division," as used in the statute. The former applies to allowances made to a shipper under section 15 for services which the carrier can be compelled to perform, but which he allows the shipper to perform. The word "division" applies only in cases of through routes, to the portions of the joint rate which each line carrier receives. If the services performed by a shipper or carrier is a switching service, the allowance will be a switching charge and such allowances have been made to tap lines. They complain of this and say they want a "division." The reason for this is apparent. A switching charge would be from \$1.50 to \$5 per car. The divisions which have been improperly allowed to tap lines by carriers were on the theory that a switching movement was a

part of the through route. The "divisions" made range from 2 to 4 cents per 100 pounds, making the "allowance" to the shipper or its tap line \$12 to \$18 and \$20 per car. Of course, they want "divisions." But the character of the service must always determine the compensation. If the service is switching the allowance will be a switching charge; if it be a line haul over part of a through route there will be a "division" of the joint rate.

II.

Transportation of logs.

Logs are the raw material out of which lumber and other forest products are manufactured. Their relation to lumber is the same as the relation of wheat to flour, iron ore to steel. In all tariffs and classifications logs are recognized as a distinct commodity, the rates upon which are fixed with reference to value, loading, and the distance transported. The cost of milling lumber or other like products involves the cost of the logs at the mill, and this necessarily involves the cost of transporting them there. A sawmill is usually located upon a line railroad and has a switch connection for the delivery of carload lumber. If the forest is near, the logs are hauled by team. As the timber is cut away the log haul increases, and logging roads of various types are put in to reduce the cost of transporting the logs from the forest. Whether the mill transports its logs from an immediate territory

or buys them on the Pacific coast and has them shipped a long distance, the cost of the transportation in either case and in all cases is a part of the cost of the logs at the mill. Any practice, therefore, by line carriers which relieves the mill owner of the reasonable charge for the transportation of logs is a *direct contribution to his net operating revenue*. There is no more reason or right for a common carrier to contribute to the mill owner the cost of transporting logs than there would be in contributing the logs themselves, or furnishing the mill owner with forests free from which he might cut his timber. In either case the carrier would be making a direct contribution to the net operating revenues of the mill owner, and the purpose in making such a contribution would be to get the lumber traffic. There is no difference in principle between buying the lumber traffic by giving such a free service and buying the traffic with money or a cash rebate from the published rate.

Any practice by a carrier which results in contributing to a mill owner the cost of transporting his logs, or any part of the fair charge for transporting them, to secure his lumber traffic, is unlawful, and a violation of the statute.

III.

The milling-in-transit privilege as practiced by tap lines.

The evidence in this case shows two practices. The first is the more general. It consists of the tap line filing with the Commission a logging rate with a milling-in-transit privilege, then arranging with the line carrier for a "division" of the lumber rate, and applying the lumber rate to a tap line "station" at the forest where the logs originate. The line carriers put in a blanket rate on lumber, which applies to every station in this territory, covering parts of three States of the Union, with a concurrence in milling privileges established by "connecting carriers." They established through routes and joint rates over their own lines and the tap lines. The "joint rate" being only the blanket lumber rate, the result of this arrangement is, that when the logs are milled into lumber at the mill, the blanket lumber rate is extended to the terminal of the tap line at the forest; the tap line is given a division of the blanket lumber rate, and the charge for the log haul is *entirely obliterated*. By this practice a mill owner secures the transportation of the logs from the forest to his mill without paying anything for the transportation. The allowance which he receives from the line carrier out of the lumber rate pays the entire cost, and often more, of the transportation of the logs from the forest to the mill.

This tap line milling-in-transit differs radically from the milling-in-transit upon main-line railroads. The tariffs of the Chicago, Rock Island & Pacific Railway, Kansas City Southern Railway, Missouri Pacific Railway, and other main lines give milling-in-transit privileges upon logs. The logs are charged a high rate, often a penalty rate, from the forest to the mill. After they are milled, if the lumber is shipped out over the same line, the lumber rate is charged in full and the log rate into the mill is reduced, but still remains a substantial charge. Take the instance given by our division of tariffs upon the Rock Island road, which is typical of the practice by line carriers. There are two stations, Moreland and Ruston, in the State of Louisiana. They are 99 miles apart. The blanket lumber rate into Memphis, Tenn., from both these points is 14 cents; there are two rates published on logs from Moreland to Ruston; one is 11 cents, called the "Billing rate," the other is $3\frac{1}{2}$ cents, called the "Net rate." If the logs are hauled into Ruston by the Rock Island and the lumber is transported over the Rock Island lines from Ruston to Memphis, the total charge is $17\frac{1}{2}$ cents—the full lumber rate of 14 cents from Ruston and a $3\frac{1}{2}$ -cent charge for the log haul from Moreland to Ruston. Now, if we take a tap line extending 99 miles from Ruston to a station called "Tap Line," the application of the tap line billing practice would be to extend the 14-cent lumber rate back to "Tap Line." The result would be that a mill owner at Ruston owning a forest or purchasing his

logs at Moreland would pay for his log and lumber haul $17\frac{1}{2}$ cents, while a mill owner at Moreland, having a forest at "Tap Line" and being the proprietary owner of the tap-line railroad, would pay 14 cents for his total log and lumber haul, thus creating a very great discrimination and preference in favor of the mill owner having the tap line.

To meet this objection, so apparent and manifest, some of the tap lines that have so-called independent mills upon their lines have put in a small charge for the log haul, which they collect from the independent miller and also make a book charge against the proprietary company for the hauling of logs. This charge in one case, which is the highest made, is $1\frac{1}{2}$ cents. This rate is published, *but it is no part of the through rate.* It is an *intrastate rate.* The tap line secures a division of the lumber rates on its milling-in-transit privilege, without regard to the fact that it is collecting $1\frac{1}{2}$ cents from the independent mill. This log charge the tap line collects without accounting for it upon the joint through-route rate. This furnishes a weak argument to meet the objections of the former case.

The so-called independent mill is usually a sort of by-product for the proprietary mill. These independent mills do not manufacture the same kind of lumber manufactured by the proprietary mill, or do not, for other reasons, compete with the proprietary mill owning the tap line. An independent mill owner is allowed to establish his mill upon the tap line a few miles from the main-line railroad. He gets his mill

site from the tap line mill owner; he buys his timber from him; the proprietary mill owner's tap line hauls the logs to the mill and makes a small charge for the haul. The tap line then arranges with the main-line railroad for a through route, and as the originating carrier secures a large division of the blanket lumber rate, 2 to 4 cents per 100 pounds. The independent mill therefore becomes a by-product to the proprietary lumber company. We do not say that there is anything unlawful in the proprietary mill's arrangement with the independent mill; but we do say that the whole arrangement, when properly viewed in connection with the dominant traffic of the tap line owner, is a device for securing divisions out of the main-line lumber rates. The delivery of the lumber from the proprietary mill over the switch to the main-line railroad is a shipper's delivery of his traffic. The public should not be charged for performing this service, for we must bear in mind, as stated by the Commission in the terminal case, that where a substantial benefit is given by a carrier to a shipper by way of allowances out of main-line rates, a loss results that is made up by charges upon other traffic, and in that way the public bears the burden.

This practice of absorbing the log haul is a bald, open contribution to the mill owner.

The so-called milling-in-transit privilege, as practiced by the tap lines, results in free log hauls and is

unlawful. Any practice by which the line carrier assumes the burden of transporting logs for a mill owner is a rebate, the purpose of which is to buy the mill owner's lumber traffic.

IV.

Matters claimed by the tap lines as bases for through routes and divisions of the main-line lumber rate.

Incorporation.—The act to regulate commerce makes no distinction, in the application of the provisions of the act, between corporations or persons. The privileges of, and prohibitions upon, practices in transportation apply alike to incorporated companies and carriers that are not incorporated. A group of men may carry on a business of transportation; at a later time they may incorporate that business and issue the stock to themselves; this change in the ownership and operation does not confer any additional rights or subject them to any additional or different obligations or penalties. The mere act of incorporating a logging railroad or tap line does not confer, in itself, any special privileges.

Common-carrier tap lines.—After the passage of the Elkins Act a great number of logging roads were incorporated under State statutes as common carriers. These statutes are general incorporation acts, under which a specified number of persons may become incorporated for any purpose stated by them in their application.

While in most cases this confers upon the corporation certain rights and, when they offer to carry prop-

erty for other persons, may constitute them common carriers as to such traffic, it does not prevent an inquiry into the whole matter to determine whether they are *bona fide* common carriers as to all traffic. The power to investigate and determine whether such incorporation and incidental common carriage is assumed as a device for the purpose of evading the Federal law and securing rebates or unlawful discriminations or preferences upon the traffic of the proprietary owners can not be defeated by this arrangement.

Prior to the enactment of the "commodities clause" and the conference of power upon the Commission to determine whether or not rates and practices by railroads are unlawful and to prescribe reasonable rates and practices for the future, this court held that a practice by two line carriers which resulted in a violation of the Federal act prohibiting discrimination in transportation rates could be enjoined; that the court could look through the forms adopted by the carriers—the business in itself then being otherwise legitimate—to ascertain whether *in fact* it resulted in a violation of the act to regulate commerce. (*New Haven R. R. Co. v. Interstate Com. Com.*, 200 U. S., 361.) The power which the court in that case exercised has since been vested in this Commission. The Commission may now investigate the form and method of carrying on interstate transportation business, and if after full hearing it is of the opinion that any "practices whatsoever" are "unjust or un-

reasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act," it may prescribe what "practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist * * *." (Section 15.) If the practice by line carriers could be investigated by the court prior to the act of 1906 and, if found to be in violation of the act, be prohibited, certainly since the act of 1906 a practice by a line carrier in connection with a tap line may be investigated by the Commission, and if found to be unlawful it may be prohibited. Common carriage of a small outside traffic by the tap line can not defeat this power.

Common carriers as to part.—In the *Crane Iron Works* case the Commerce Court said:

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers.

The fact that these tap lines have been incorporated by proprietary mill owners, and may be regarded as common carriers as to some outside traffic, does not prevent the Commission from finding, if it be true, that as to the traffic of the proprietary mill they are a plant facility performing a plant service. (*A., T. & S. F. Ry. v. Grant Bros.*, 228 U. S., 177.) Nor does it follow that because they transport lumber

for an outside party over what is practically a spur track, that such transportation is anything more than a shipper's delivery to a main-line carrier. A railroad originally organized as a tap line may develop into and become a line carrier; when it does, the Commission will so recognize it. Each particular case must be decided upon the character of its particular traffic. It is *the character of the transportation service*, rather than the character of the agent, which determines whether the agent is entitled to through routes and joint rates.

Device.—The act to regulate commerce prohibits rebating, directly or indirectly, “by any device whatever.” Construing this phrase in a criminal proceeding, this court, speaking through Mr. Justice Day, said:

* * * the act seeks to reach all means and methods by which the unlawful preference or rebate, concession, or discrimination is offered, granted, given, or received * * *. A device need not be necessarily fraudulent, the term includes anything which is a plan or contrivance * * *. It is not so much the particular form by which, or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions or rebates from the fixed rates duly posted and published. (*Armour Packing Co. v. United States*, 209 U. S. 56.)

In the case at bar the Commerce Court recognized the power of the Commission to investigate and deter-

mine whether or not a tap line was a *bona fide* common carrier. It said:

The evidence before the Commission tending to show that the petitioning tap lines were originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, *might have justified the Commission in finding that these tap lines were not in fact bona fide common carriers.* (Rec., 190.)

The Commission therefore has power, and it is its duty, being charged with the enforcement of the provisions of the act to regulate commerce, to investigate and determine whether a particular tap line is, in fact, a *bona fide* common carrier as to all of its traffic; to ascertain what the nature of the transportation service performed by the tap line is, and from all the evidence determine whether the organization, the methods of

doing the business, and the transportation service carried on, is in fact a device to secure rebates and concessions from the published rates. If, upon such investigation, it is found that such was and is the purpose of the organization and practices, it becomes the duty of the Commission to prohibit the line carriers from establishing through routes and joint rates that result in such rebating and discrimination.

General observations.—The investigation in this case has developed a widespread commingling of the business of transportation with private business. The aggregate amount of the allowances out of main line lumber rates is enormous. It reduces legitimate railroad revenues by an insidious system of rebating. The purpose in this case is to separate the public business from private business; to insure to public line carriers reasonable compensation for every substantial service that they render; to place upon each shipper the duty of paying the reasonable charges for the services which he receives; to prevent private enterprises from casting upon the public, through the common-carrier service, a part of the burden of doing their private business. Each shipper should perform its interplant service, and deliver its traffic to the line carriers.

This requires the separation of the charges for the line haul from switching charges where absorption of the switching service is not permissible. It is within the power of the Commission to require that this shall be done.

After holding that icing is a transportation service under the statute, this court, speaking through Mr. Justice Lamar, said:

It [the Commission] may prescribe the form in which schedules shall be prepared and arranged (section 6) and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such power. They can not make rates. They can not interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those orders are void.

Atchison, Topeka & Santa Fe Ry. Co. v. United States et al. Opinion filed January 26, 1914.

V.

OPINION OF THE COMMERCE COURT.

In the four cases under consideration the tap lines are named in the first list given in the order. (Rec., p. 180.) The Commerce Court deals with that part of the order relating to these tap lines, which reads:

that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service

performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common-carrier railroad but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports. (Rec., pp. 180, 181.)

The Commerce Court in its opinion concedes much that we claim, but seems to have confused the findings and order of the Commission in regard to some specific matters.

As already noted, the Commerce Court concedes that there was evidence before the Commission which might have justified the Commission in finding that these tap lines were not *bona fide* common carriers. (Rec. 190, 191.) If they are not *bona fide* common carriers, what are they? There is but one answer; they are plant facilities, and the Commission so found. While fully recognizing that the Commission found that they are plant facilities, the Commerce Court says that the Commission held: "That each of the petitioning tap lines is a *bona fide* interstate common carrier." (Rec. 190.) A reading of the order shows that this is not a correct representation of the Commission's finding. The Commerce Court, in the final analysis, seems to take the position that if they were common carriers as to *any* traffic they were necessarily common carriers as to all like traffic

for the proprietary companies; that they could not be plant facilities as to part and common carriers as to part of their traffic, although the court in another part of the opinion states that they may be.

The law is clearly settled,

That a common carrier may, however, as to some of its work, act in a strictly private capacity is well settled (*A., T. & S. F. Ry. v. Grant Brothers*, 228 U. S., 177); and that it may as to certain shippers, and particularly as to a proprietary company, be a mere plant facility and perform merely plant or industrial services as distinguished from transportation services, has been held by this court in *Crane Iron Works v. U. S.*, No. 55, June 7, 1912. (Rec., pp. 192, 193.)

An attempt is made to distinguish the *Crane Iron Works* case by saying that the services in that case were "interplant" services. This is not the fact. The larger part of the service in that case, as in this, was switching cars from the warehouses to the line railroad—delivering the freight to the carrier.

Disregarding the similarity in the cases the Commerce Court proceeds to say:

When, as in these cases, a full and fair hearing has been granted, the Commission's findings of fact are subject to review in this court only upon an allegation that they are not sustained by any substantial evidence in the record before it or are arbitrary in *being based upon improper distinctions and considerations*. (Rec., pp. 193, 194.)

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The important questions, therefore, to be considered by this court are:

First. Whether the Commission acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be acting as a mere plant facility of and performing mere plant service for the proprietary companies. (Rec., p. 195.) * * *

Referring to the evidence, the Commerce Court says:

It is apparent therefrom that very real evils existed, evils demanding correction. (Rec., p. 198.)

* * * * *

The power of the Commission to prevent such rebates and unjust discriminations is beyond question. (Rec., p. 199.)

Then, as a basis for holding that the action of the Commission was arbitrary, the Commerce Court makes the following statements (Rec., p. 205):

In effect the Commission holds:

First. Switching service within 3 miles of a trunk line is by custom *included in the through rate.*

Second. *Such switching is a transportation service.*

Third. For switching products of a proprietary mill located within the 3-mile limit, no division of the through rate may be made, but an allowance, under section 15, may be paid either to the industry or to its tap line, if the trunk line prefers to permit the industry or tap line to do this work.

Fourth. *For switching products of a non-proprietary mill an allowance may be given, and, in the case of a common carrier tap line, a division out of the through rate should be made.*

Fifth. But no such allowance or division shall be made if the proper switching distance is or should be less than 1,000 feet.

Sixth. * * *. *Neither allowance nor division is to be given the tap line for switching the products of such a proprietary mill.*

In our judgment *these distinctions must be regarded as arbitrary* and without justification as a matter of law.

We have shown that switching is an independent and distinct service. This the Commission recognized, and where allowances are made for this service—switching cars from the mill to the main track—it is a switching allowance. The *switching allowance* is given, when asked for (see Victoria & Fisher Ry.), under section 15, but in cases where a “division” of a through rate is insisted upon for a switching service, it is refused. The Commission found, as a fact, that in this territory the line carriers absorbed all switching services to a distance of 3 miles. Accepting this fact the Commission held that if they absorbed this service for shippers generally, then where they permitted a shipper or its tap line to do the switching, an allowance of a reasonable switching charge might be made under section 15. This applies to all traffic when such an allowance is asked for. The Commerce Court fails to distinguish between “allowances” under sec-

tion 15 and "divisions" of joint rates between common carriers operating a "through route." (Rec., pp. 17, 18.)

In the case of nonproprietary lumber traffic if it amounted to a line haul, division of the lumber rate could be allowed. The Commission reserved the right to supervise these divisions on nonproprietary traffic in order to prevent a main line from making unusually large allowances to tap lines as an inducement to the proprietary companies to give the line carrier their own lumber traffic.

It is difficult to see how the Commission could have more carefully guarded the whole situation and cut out the evils that existed "*demanding correction.*" The large proprietary mills are all located on the main lines of railroad and are connected with main lines by switch connections. So far as the lumber traffic is concerned, therefore, the only service which the tap line could perform for the proprietary lumber companies was to switch the cars from the mill to the main line and to place the empties at the mill—excluding unnecessary back hauls. If, as stated by the Commerce Court, a tap line may be a common carrier as to some traffic while it is a plant facility as to other traffic, then it was within the power of the Commission to say that as to nonproprietary traffic *where there was a line lumber haul by the tap line* a reasonable division might be made on such traffic.

But the Commerce Court says:

When these tap lines, * * * take the carloads of finished lumber at the mills *for the purpose of either hauling or switching them to a trunk line* so that they may reach their ultimate destination beyond the State, *the interstate transportation has actually begun.*

That is to say the switching is a part of a through route and the tap line is entitled to a division of the rate.

This is contrary to the authorities which hold that the shipper must deliver his traffic to the line carrier, or as expressed in some of the cases "*must bring his traffic to the highway.*" Because the statute requires this service on a private siding to be performed by a carrier it does not make it any the less a shipper's delivery. For the purposes of the statute—that is, *for the purpose of regulation*—the whole service is within the statutory term "transportation." Nevertheless the switching is for the shipper to perform or pay for, unless it may be properly absorbed by the line carrier. While it is a way of stating it to say that the line rate "extends to the mill" it is not technically a correct statement. The *line rate* only extends to the point where the carrier receives the shipment *for TRANSPORTATION* to destination. If the carrier absorbs a service beyond that point it is not, properly speaking, an extension of the rate to the mill. This is not an artificial construction or definition, for if absorption works discrimination the carrier may not absorb the service, but must charge for it. This the

carrier could not do if the *line rate* "extended to the mill." But where the switching is recognized as a service additional to the line haul it may be freely treated either by absorbing it or charging for it, as the particular case justifies.

The Commerce Court therefore erred in holding that the refusal to give a "division" of the line rate for a *switching service* was arbitrary.

Log haul.—In treating the log haul from the forest to the mill the Commerce Court said (*italics ours*):

The hauling, it is true, is primarily for the benefit of the mill; consignee and consignor are one. If the service had continued to be what it originally was in most of these cases, by a private carrier for the one industry alone or from the forests to the directly adjacent mills, forest and mill being in fact one entire plant, so that the haul was interindustrial, it might well be held to be a plant-facility service.

* * * * *

The Commission might have limited the blanket rate to the lumber either directly or by forbidding milling in transit. This, however, was not done.

* * * * *

** * * that other mills must haul their logs by team to the tap line or must purchase them in the open market, and that thereby these proprietary mills have great commercial advantages over their competitors does not in any manner affect the matters now before us. (Rec., pp. 209, 210, 211.)*

In short, if a common carrier at a given place wholly absorbs a log haul for big shippers, the fact that other shippers are compelled to perform these services for themselves "*does not in any manner affect*" the case. This is contrary to the doctrine stated in *Wight v. U. S.*, *supra*.

The Commerce Court absolutely ignores the character of this milling-in-transit privilege as practiced on the tap lines. The direct advantage to the proprietary mills in having the haul of their logs to the mill paid for by an allowance from the lumber rate is not referred to. In the illustration which we have already given it clearly appears that the proprietary company under this peculiar milling-in-transit privilege is entirely relieved from any expense in hauling logs. This expense is paid for by an allowance out of the lumber rate. The non-proprietary mills pay something for the log haul although it is not a part of the through rate. The Commerce Court erred in its conclusion that—

as the actual service rendered by the tap line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and nonproprietary mills, and as this is held to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former. (Rec. pp. 211, 212.)

Substantial evidence.—The Commerce Court deems it unnecessary to consider the evidence as to each petitioning tap line separately. It decides the case

wholly "on a disregard by the Commission of the very criteria which it adopts to determine the ultimate facts or on the adoption of distinctions without real differences," and concludes as follows:

It follows, therefore, that the Commission was not only without power to forbid any allowance whatsoever to be made by a trunk line to the petitioning proprietary industries for switching either less than 1,000 feet or more than 3 miles, but it was also without power to prohibit the making of joint rates by the trunk lines and the petitioning tap lines and the payment by the former to the latter of some division thereof for its services in hauling logs to and lumber from the petitioning proprietary mills, and its order must to this extent and as to these petitioners be annulled. (Rec., p. 212.)

CONCLUSION.

While the Commerce Court states that there are very great evils existing which demand correction in these cases, and that it is within the power of the Commission to prevent this rebating and discrimination, it practically ties the hands of the Commission. If this opinion be the law then there is *in fact* no remedy for the evils, the rebating and the discriminations, which admittedly exist in these cases. The only way in which these evils can be eradicated is by prohibiting the practices which result in rebating and discrimination.

The owners of these tap lines are not in the railroad business as a business. They are lumbermen

with logging roads as a part of their plant facilities. If by doing a little outside common carriage business they can secure a half million dollars in rebates upon their lumber rates, and the Commission is without power to prohibit this practice, then rebating is legalized so long as the interests of lumber merchants induce them to dabble a little in railroading.

We respectfully submit that the position of the Commerce Court is inconsistent in holding: (1) That there was evidence sufficient to warrant the Commission in finding that these tap lines were not *bona fide* common carriers, and almost in the next sentence saying, that it is *arbitrary* to hold that they are plant facilities as to their own traffic if they are common carriers as to outside traffic; (2) That as the Commission referred to switching as "transportation" under the statute, therefore it must be held that switching is a part of the line haul, and the tap lines are entitled to through routes and joint rates for a switching service; (3) That as the Commission recognized that the transportation of logs with a true milling-in-transit privilege—a *bona fide* charge for the log haul—is legitimate, therefore, a milling-in-transit privilege without a charge for the log haul *must be legitimate*. These several positions taken by the Commerce Court seem to be not only inconsistent, but an unnecessary application of technical construction to certain words in the Commission's report. Though not intentional, the result is to protect an existing evil of large dimensions and widely

extended practice, and to cripple the powers of the Commission as a regulating body.

The importance and far-reaching effect of the decision in this case can not be easily overstated. These are test cases involving definitions of the "line haul" for which the line rate is charged; a switching service, as distinguished from the line haul, for which additional charges may be made; and milling-in-transit as practiced by tap lines, which results in casting upon the carrier a part of the expense of a shipper's business. The practices condemned in these cases result in very serious depletion of railway revenues, and cast upon the general public a burden which belongs to individual and favored shippers.

They create grave discrimination between shippers and give to favored shippers undue preferences. The extent of these allowances—and this means cash out of the carrier's treasury—is stated by the Commission in its report in this case (Rec. p. 2):

The aggregate amount so paid by the regular lines to industrial lines throughout the country is not known. It has been estimated at not less than \$100,000,000 a year. On the basis of such investigations as we have been able to make it seems entirely conservative to say that they amount, for the whole country, to not less than \$50,000,000 or \$60,000,000 a year.

In Industrial Railways Case No. 4181, decided by the Commission January 20, 1914. (Copies for the

use of the court are filed herewith), the Commission said:

The allowances so paid and the free services so performed involve in the aggregate an immense expenditure for which the carriers must necessarily be reimbursed through the rates exacted on the traffic of the general public; at the same time, it must be noted, the allowances and free services so paid and performed by the carriers relieve the particular industries of a large burden of expense which the industries themselves would otherwise have to meet as a part of their manufacturing cost. This operates as a discrimination against the smaller competitors of the favored concerns because, in the nature of things, the benefit of such allowances and free services can be enjoyed only by the larger industrial establishments with plant railways (p. 213).

Citing special cases the Commission said:

Allowances.—During the year ending June 30, 1912, the Pennsylvania Railroad paid \$1,019,910.41 in divisions out of the rate to only 10 such industrial railways connected with steel plants; the New York Central's western lines paid to 12 such industrial railways an aggregate of \$660,057.93; the Baltimore & Ohio paid to 13 such industrial railways the sum of \$530,317.06 (p. 214).

* * * * *

Free services.—During the year ending June 30, 1911, the railroads performed for a single steel industry, the Republic Iron & Steel Company, at Youngstown, Ohio, free spotting

services on 75,134 cars at a cost to the railroads of \$104,329.62, or \$1.40 per car (p. 215).

It is essential in dealing with these practices that the Commission determine, where the evidence warrants the conclusion, that the tap line or industrial railway is a plant facility as to the proprietary traffic, although it may be at the same time, a common carrier as to some outside traffic.

We respectfully submit that the decision of the Commerce Court should be reversed; that the doctrines herein expressed regarding the extent of the line haul, the character of a switching service on a private siding, and the unlawfulness of absorption of log hauls, should be sustained.

As the Commerce Court declined to discuss the evidence in regard to the particular tap lines we have not referred to it in the brief, but attach an appendix giving a statement regarding each tap line and lumber company. We also submit herewith under a separate cover maps showing the four tap lines as they now exist and as they existed at the time of incorporation.

Respectfully submitted.

JOSEPH W. FOLK,

CHARLES W. NEEDHAM,

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APPENDIX.

THE APPELLEE TAP LINES AND LUMBER COMPANIES.

No. 829.

The Louisiana and Pacific Railway Company and four lumber companies, named as petitioners in this case, are owned and controlled by R. A. Long. He owns 70 per cent of the stock in each company, and the remaining 30 per cent is held by his associates and agents. The tap line company was a party before the commission in the tap line case, and the evidence submitted by it at the hearings before the Interstate Commerce Commission is found in volume 1 of the printed evidence in this case, beginning at page 636 of the record. The exhibits submitted to the commission and referred to are found in the transcript of record in this number. The findings of the commission regarding this company are set forth on pages 591 to 594, inclusive, of the supplemental report. (Rec. p. 111.)

Mr. Sweet, an associate and officer in all the companies of the "R. A. Long interests," who has been connected with these interests for 27 years, and other officials describe the lumber companies, the tap line, and the lumber business. From this evidence (Rec., pp. 636 to 738), the contracts and the annual reports of the railroad companies,

in evidence before the commission, the following facts are taken:

1. The Hudson River Lumber Co. was organized in 1898; its mill is located at De Ridder, within about 1,200 feet of the Kansas City Southern Railroad. It was the first lumber company located at De Ridder; a switch track connected its mill with the railroad, which was operated without charge by the Kansas City Southern. The lumber company built a logging road, afterwards called the De Ridder & Eastern. It built the logging road from its mill into the forest, and operated it without incorporation. In 1904 it incorporated the Louisiana and Pacific Railway Co., which took over the logging road. The operation of this logging road and the loading lumber at the mill *were a part of the manu of manufacturing business* carried on by the lumber company.

2. The King-Ryder Lumber Co. commenced business in 1891; its mill is located on the Kansas City Southern at Bon Ami. A switch connection was put in between the mill and the railroad, and operated without charge by the Kansas City Southern. The lumber company built a logging road from its mill into the timber and extended it as the timber was cut off. The operation of the logging road and the loading of the lumber upon the cars on the switch were performed by the lumber company *as a part of its business*.

3. The Calcasieu Long Leaf Lumber Co. is a successor to the Bradley-Ramsey Lumber Co.

Its mill is located at Lake Charles. It had a track connection with the Kansas City Southern at Lake Charles, which was operated by the main line. Now it also connects at Lake Charles with the Louisiana & Western, a part of the Southern Pacific System, and with the St. Louis, Iron Mountain & Southern Railway. All switching was done by the main-line roads without expense to the lumber company up to the time of the organization of the tap line. The forests of this lumber company are located at Camp Curtis, about 31 miles from the mill. A narrow-gauge logging road was constructed by the Bradley-Ramsey Lumber Co. from a point at Lake Charles (point marked Gosport) north to a point shown on the map as Fayette, thence east to Camp Curtis. Logs were floated from Gosport to the mill. This logging road was operated by the lumber company as a part of its manufacturing business, and it loaded the lumber upon the cars at its mill. The Bradley-Ramsey Lumber Co., together with its logging road, was purchased by the Long interests in 1905.

4. The Longville Lumber Co. was organized in and has its timber tracts near Vandercook. A logging road was constructed from its timber tract to its mill at Longville; the mill is located on the Lake Charles & Northern Railway, constructed, owned, and operated by the Southern Pacific system.

5. The Long-Bell Lumber Co. is a selling agent for the R. A. Long interests; it does not manufacture lumber.

6. The tap line, the Louisiana & Pacific Railway Co., was originally incorporated June 6, 1904. The objects for which the company was organized, as stated in its charter, are:

To construct, maintain, and operate, or to lease and operate, a railroad commencing at Bon Ami, Calcasieu Parish, State of Louisiana, in an easterly direction through Bon Ami Junction, in said parish and State; to lease and operate railway and steamships as common carriers of freight.

The charter was amended March 12, 1907, "to acquire, construct, maintain, and operate a railroad or railroads, and branches thereof, in the State of Louisiana, as a common carrier of freight and passengers; etc."

The authorized capital stock is \$200,000, of which only \$51,000 has been issued, \$20,000 as a dividend to stockholders, and \$31,000, it is stated, was issued for cash. The stock is held by the R. A. Long interests in substantially the same proportion as the stock of the lumber companies, namely, 70 per cent by R. A. Long and 30 per cent by his associates and agents. The tap line has a bonded debt of \$582,200, created to pay notes given to the lumber companies in payment for their logging roads.

In October, 1906, Mr. Long started a scheme which the witness, Davis, describes as "an effort to find other outlets for his tonnage" (Rec., p. 654) and,

Mr. Sweet says, to "secure more money from the railroads." (Rec., p. 753.) Mr. Davis says:

Before Mr. Long started south with his property he organized the Louisiana & Pacific Railway, taking over the De Ridder & Eastern road, which was running at that time between Bundicks and De Ridder. Also the line of the Louisiana & Pacific running from Bon Ami out to Walla. Those two lines were in existence at the time. He had this Lake Charles & Leesville road, which was a narrow-gauge line, which had just been purchased, running from a point on the Calcasieu River north over toward Camp Curtis. Those three roads were taken over by this company, and, as he stated, this extension south was started when these negotiations with the Southern Pacific people were entered into. Mr. Harriman wanted a line north and Mr. Long wanted a line south. (Rec., pp. 654-655.)

Evidently the witness is mistaken as to the time these roads were taken over. He has in mind the fact that the roads were taken over during the period of what is termed "the reorganization" of the Louisiana & Pacific Railway Co. This company filed its first report with the Interstate Commerce Commission October 21, 1905, for the year ending June 30, 1905. Under the head "Property operated" (p. 9) it gave the mileage of the line, 1 mile; "spurs," $1\frac{1}{2}$ miles; line operated under trackage right, 10 miles; total, $12\frac{1}{2}$ miles.

In its report filed October 6, 1906, for the year ending June 30, 1906 (p. 9), the same mileage is given.

October 4, 1907, it filed its report for the year ending June 30, and reports, without giving details, 26 miles of railroad from De Ridder, La., to Fulton, La. On page 53 statements called for are answered as follows:

1. All extensions of road put in operation? Answer: Twenty-six miles.

2. Decrease in mileage, etc.? Answer: None.

3. All other important physical changes? Answer: None.

4. All leases taken or surrendered? Answer (p. 53): Lease of equipment and trackage rights with King-Ryder Lumber Co., canceled. New leases made with Calcasieu Long Leaf Lumber Co., Hudson River Lumber Co., and King-Ryder Lumber Co., granting use of equipment and trackage rights.

Under explanatory remarks it states: "The 61 miles of branches and spurs were not operated by the Louisiana & Pacific Ry. Co., but by lessees named on page 53."

There is no increase in capitalization, and under "Explanatory remarks" it is stated: "The capitalization per mile, shown as \$345, is small, considering the recent development of the property. When the Louisiana & Pacific Railway Co. was organized and unincorporated, the capitalization of \$30,000 was thought entirely adequate for all future developments. When

later the line was extended, no change was made in the capitalization, because it could not be determined just what amount of capital would be required and it was possible to make loans sufficient to carry on the development."

In the annual report, filed with the commission October 25, 1908, under the heading "Roads operated" (p. 13) it gives the following:

Main line, De Ridder Junction to Bundicks, 8 miles; Lilly Junction to Walla, La., 7.4 miles; Fayette to Camp Curtis, 9.4 miles; Milepost 38 to Banks, La., 2.5 miles; total mileage owned, 27.3 miles. Line operated under trackage rights, Lake Charles & Northern Pacific Railway Co., De Ridder, La., to Milepost 38, 38 miles under trackage right.

Total owned and trackage, 65.3 miles.

Under "Funded debt," an explanatory remark reads:

This \$362,549.57 represents our indebtedness to several companies in the acquirement of track material and equipment. These notes call for interest at rate of 6 per cent per annum from date, but do not specify interest payable annually and the interest has not been paid on accrual.

It clearly appears from these reports that at the time the contracts for divisions were made, October, 1906, this railroad company did not have any railway excepting the 2½ miles of track and "spurs" and the lease of the King-Ryder Lumber Co.'s logging road. To get the full record of this "reorganization" we must now examine the contracts filed as exhibits. The first is with the Southern Pacific (Rec., pp. 188

to 191), dated October 31, 1906. This contract is signed by the Louisiana Western Railway Co. for the Southern Pacific Co. (first party), the Louisiana & Pacific Railway Co. (second party), and by the four lumber companies (third party). The contract recites that the Louisiana Western Railroad Co. is controlled by and constitutes a part of the Southern Pacific System; after other recitals it agrees in substance:

(1) That during the existence of the agreement the railroads "will interchange business with each other at said point of connection of their respective lines—that is, Lake Charles, La."—on the basis of a division of rates as herein set forth.

(2) That the lumber companies, during each and every month until the expiration of the agreement, will ship over the Southern Pacific, via the connection at Lakes Charles, "at least 40 per cent" of the aggregate products of their mills.

(4) That the two railroad companies will enter into joint arrangements and file the same with the Interstate Commerce Commission.

(5) The lumber companies agree that the Louisiana & Pacific Railway Co. may route their traffic so as to give the Southern Pacific system such haul as shall yield it the largest revenue.

(6) That in respect to the division of freight rates during the existence of this

agreement, the Louisiana & Pacific Railway shall be paid 4 cents per 100 pounds on the products of said mills shipped during the term of the agreement, excepting export business, division of which is to be fixed in the future agreement.

(7) The said party of the first part agrees that it will at all times during the existence of this agreement publish for all points mentioned in its tariff the same freight rates on all products of the parties of the third part from all points on the line of railways of the said party of the second part as are or shall be in effect from Lake Charles, La., on the line of the said party of the first part, which rates shall at all times during the existence of this agreement be competitive with rates from other points in Calcasieu Parish producing yellow pine to all destinations to which the party of the first part may be able to arrange through rates.

(11) This agreement shall commence and become effective on the date hereof, and shall be and remain in full force and effect for the period of 20 years thereafter, *or so long as the parties of the third part shall operate their mills along the line of railway of said party of the second part.*

It will be observed that this contract was made before the Louisiana & Pacific Railway Co. had any railroad in existence between De Ridder and Lake Charles; the contract was in fact a contract with the lumber companies. Their mills were then connected

with the Southern Pacific at Lake Charles, by switches and over the Kansas City Southern Railway.

In connection with this contract a corporation was organized October 30, 1906, called Lake Charles & Northern; the capital stock was taken and is now held by the Southern Pacific Railway Co. This railroad was opened for business October 25, 1908. (Poor's Manual (1913), p. 1460.) The Southern Pacific contract was executed the day after this company was incorporated. On the same day—October 31, 1906—a contract was executed by this newborn railroad company. This contract recites that the Louisiana & Pacific—

is the owner of a line of railway from De Ridder, La., to a certain point on the Calcasieu River * * *. That part of said line of road lying between Ramsay Junction and said point on Calcasieu River has been completed, but is a narrow-gauge road. Of the remainder of said line of road—that is, that portion lying between De Ridder and Ramsay Junction—a portion has been completed and the other portion is now being constructed.

The said party of the first part also owns a right of way for a railroad from Lake Charles to a point on said narrow-gauge road near the northeast corner of section 32, township * * *.

The said second party [just organized] desires to purchase said first party's line of road from De Ridder to said point on the Calcasieu River and said right of way from Lake Charles

to the junction with said narrow-gauge road in said section 32; and said first party is willing to sell its said road and said right of way, on condition that it can have the joint use of said line of road from De Ridder to Lake Charles, which condition is not objectionable to said second party.

The purchase price is \$15,000 for the narrow-gauge road, or "cost to be ascertained by reference to the books of said party of the first part, *and the cost of balance of the road to be verified by the engineers of the parties hereto.*"

The purchase price is to be paid, \$90,000 *upon the execution of the contract*, and the balance "*monthly as the work of construction progresses on estimates to be furnished by said first party and verified by engineers of the party of the second part, the final amount to be ascertained from the records of the first party by the engineers of both parties.*"

The contract includes payment to the Louisiana & Pacific Railway Co. for the narrow-gauge road, and the cost of all right of way owned or to be obtained between De Ridder and Lake Charles, structures of every kind existing or to be constructed, making a complete railroad between points; in addition, the Southern Pacific agrees to reconstruct the narrow-gauge road at its own expense, changing it to a standard gauge, but allowing the narrow gauge to remain for the use of the Calcasieu Long Leaf Lumber Co. during the period of reconstruction, and the rails on

the narrow-gauge road are retained by the Louisiana & Pacific.

It is then provided:

Immediately upon the conveyance by said first party to said second party of the property herein contracted to be sold, the said second party shall execute and deliver to said first party a contract, giving said first party joint-trackage rights over the entire line of railroad above mentioned, * * *

Said trackage agreement shall vest in said first party trackage rights over the said line of railroad from De Ridder to Lake Charles, with all the appurtenances thereto, for a period of 20 years from the date of this contract, for such trains as said first party may desire to operate over said road, provided that the number of trains operated by said first party over said line of railroad shall not materially interfere with the operation of trains by said second party.

* * * and for the use of said railroad as aforesaid, said first party shall pay to said second party a rental equal to 25 cents per train-mile for every train that shall be run over said road by said first party during the existence of this contract. * * *

Payments of rental shall be made monthly and on or before the 10th day of each month.

The term "train" as used in the provisions of this contract shall at all times be considered and construed to mean an engine pulling one or more cars of any kind, except an engine pulling a wrecking outfit, and no charge shall

be made for any engine running over said road when not pulling one or more cars.

The mileage for which said first party shall be required to pay shall not include the movements of trains within the switching limits of any station, in placing cars or doing other similar work, nor shall it include the moving of logging trains over that part of said line between De Ridder and the junction of the De Ridder branch, which is about three-quarters of a mile in length, or the movements of logging trains over that portion of said line lying between Bonami and the junction of the Bonami branch. Map hereto attached and made part hereof will more fully define the limits referred to.

The contract provides that the Southern Pacific is to pay the cost of maintenance during the period of 20 years and put in and maintain "such sidings as may be reasonably necessary whenever a new mill may be built contiguous to said line of railroad."

The said first party shall have the right to connect said line of railroad over which it is to have trackage rights with any logging railroad or railroads that it may see proper to build at any time during the said 20 years from any point on said line to serve any near-by lumber mills.

This agreement, with all things pertaining thereto, is entered into on the faith of the consummation and performance of a certain agreement of October 31, 1906, between the Louisiana Western Railroad Co., the said Louisiana

& Pacific Railway Co., the Hudson River Lumber Co., the King-Ryder Lumber Co., the Calcasieu Long Leaf Lumber Co., and the Long-Bell Lumber Co., for division of freights on joint business and for a routing of a proportion of the products of said lumber companies as provided in said agreement.

In reference to these contracts Mr. Sweet, an associate of Mr. Long and an official in all these companies, says:

"I made at the time of the sale a traffic arrangement, not with the Lake Charles & Northern, *but with the Southern Pacific interests*, and one contract hangs on the other."

THE FRISCO CONTRACT.

(Transcript p. 69.)

Before going to the Southern Pacific, Mr. Long had made a very remarkable contract with the St. Louis & San Francisco Railroad Company. This contract is dated October 13, 1906, and is found upon pages 191 to 198, inclusive, of the record. The four lumber companies are parties to this contract. It contemplates the construction of roads to make a connection that would enable the lumber companies to ship their products over their tap line to the Frisco, and in contemplation of this connection it was agreed that the Frisco should receive 50 per cent of all the products of the mills and allow the Louisiana & Pacific Railway Company "thirty-five per centum (35%) of the through rate,

with a maximum of 5½ cents per hundred pounds" on lumber. There are other matters in this contract which might be commented upon, but it is sufficient, for the purpose of this argument, to say that, armed with this agreement, Mr. Long was enabled, on the 31st of October, to make an arrangement with the Southern Pacific Railway Company by which that company undertook the building of the railroad which the lumber companies, under the Frisco contract, were obligated to build, making a junction with the Frisco road (afterwards built) at Fulton.

THE SOUTHERN PACIFIC.

The Lake Charles & Northern Railway *was constructed after these contracts were executed*. It was wholly paid for by the Southern Pacific, on monthly estimates, as it was constructed. (See contract and annual reports to Commission.) It was opened for business October 25, 1908, two years after the contracts were made. It connects with the mills of the Hudson River Lumber Company at De Ridder Junction and with the King-Ryder Lumber Company at Bon Ami. The connection with the mill of the Calcasieu Lumber Company is at Lake Charles. The Southern Pacific is *operating this road and can receive the products of all these mills on its line from the switch tracks*. Under the custom prevailing in this lumber belt, all switching is done from the mill to the main track by the main-line roads without charge. These lumber companies, therefore, can deliver their lumber, without

charge, from their mills to the Southern Pacific and have it transported to all points at the lumber rate, from De Ridder and Lake Charles.

Prior to the construction of this road, and at the time these remarkable contracts were made, the mills at De Ridder and Bon Ami were connected with the Kansas City Southern Railway, and the Kansas City Southern connected at Lake Charles with the Louisiana Western and the Iron Mountain Railroads. These mills, therefore, had, or could have secured under the provisions of sections 1 and 15 of the act to regulate commerce, through routes from these mills, at the published lumber rates, over all the roads named. It appears from the evidence that no through routes had been established over the Kansas City Southern from De Ridder to the lines with which it made connection at Lake Charles, but such through routes could have been compelled by an application to the Interstate Commerce Commission, if these shippers required that service. The Calcasieu Lumber Company at Lake Charles was within the switching limits of each one of the railroads named.

In view of the foregoing facts, it seems remarkable that a railroad should have been projected from Lake Charles to De Ridder for the purpose of serving the public. But admitting that it was necessary, it was entirely unnecessary that two railroad companies should operate over this line. If the Southern Pacific was to operate, as it does, between Lake Charles and De Ridder, there was no reason, from the public stand-

point, why this other company, the Louisiana & Pacific, which runs only to the lumber camps of the Long lumber companies, should also operate over the same track. The reasons for this arrangement are to be found in the desire of the lumber companies to secure a concession from the published rates on lumber from their mills to the markets, or, as Mr. Sweet puts it, "to get more money out of the railroads." They could have secured the through routes to all points reached by any of these railroads at the rate prevailing upon lumber, which was the same from De Ridder as it was from Lake Charles, through their switch connection with the Kansas City Southern and the other roads at Lake Charles. But this did not satisfy the lumber companies; they wanted to "*sell their traffic.*" It was only by a scheme of this kind, and through an agency created by them, that a large concession could be secured from the published rates.

For a less proportion of the through rate, the Southern Pacific could have secured connection with the mills over the existing line of the Kansas City Southern. The Frisco road was afterwards built and connects at De Quincy with the Kansas City Southern. A through route could have been secured from De Ridder over the Kansas City Southern to points on the Frisco. It can hardly be presumed that the portion of the rate to the Kansas City Southern for hauling the traffic from De Ridder to De Quincy, or from Lake Charles to De Quincy, would have been 35 per cent

of the through rate, with a maximum of $5\frac{1}{2}$ cents per 100 pounds. Nor can it be supposed that the portion of the Kansas City Southern for hauling from De Ridder to Lake Charles and transferring to the Southern Pacific would have been as much as 4 cents per 100 pounds. But with the division of through rates over these lines the mills were not concerned. They wanted to sell their traffic for the largest possible concession from the lumber rate.

LOSSES TO THE SOUTHERN PACIFIC.

The maintenance, under the contracts with the Long lumber interests, of the Lake Charles & Northern Railway has resulted in a large annual loss to the Southern Pacific. The reports of the Lake Charles & Northern Railway Company, filed with the Interstate Commerce Commission, show that in 1909 the net corporate losses in the operation of that road from Lake Charles to De Ridder were \$23,928.61; in 1910, \$6,190.61; in 1911, \$19,110.36; and in 1912, \$27,713.01. (See certified copies of reports.) These are actual cash losses. In addition, the Southern Pacific permits, without charge, certain log hauls over this road by the Louisiana & Pacific Company. The rent collected from the Louisiana & Pacific at the rate of 25 cents per train-mile for specified traffic is at least one-fifth of what would be regarded as a fair rental.

ADVANTAGES TO THE LOUISIANA & PACIFIC.

Assuming that there was a reason for the existence of the Louisiana & Pacific Railway Company other than as a plant facility in hauling logs, and that it was

necessary for it to build and maintain a road from De Ridder to Lake Charles, the advantages of this agreement, by which the Southern Pacific built and is required to maintain at its own expense this line of road, may be stated as follows:

[Figures taken from the annual reports of the Lake Charles & Northern Railway Company and Louisiana & Pacific Railway Company, with the exception of the "5 per cent return upon investment." Copies on file.]

	Fiscal years ended June 30—			
	1900	1910	1911	1912
Property investment of Lake Charles & Northern R. R. Co.....	\$533,888.94	\$883,674.81	\$894,134.35	\$900,168.02
Less value of equipment.....	21,900.00	21,900.00	29,866.00	29,645.30
Value of property in joint use.....	811,988.94	861,774.81	864,268.35	870,522.52
5 per cent return upon investment in joint use.....	40,599.45	43,088.74	43,213.42	43,526.13
Maintenance of way and structures expenses.....	12,489.97	21,916.64	38,061.79	33,873.06
Transportation expenses:				
Superintendence.....	1,216.13	2,429.43	3,338.83	3,876.83
Dispatching trains.....	1,001.60	1,500.00	1,300.02	732.24
Station employees.....	5,249.52	7,859.01	9,302.41	9,751.75
Station supplies and expenses.....	218.87	270.02	619.03	474.34
Water for road locomotives.....	316.00	806.25	1,227.53	1,278.92
Drawbridge operation.....	1,075.39	1,373.79	1,372.43	1,363.69
Total expenses.....	21,561.48	36,155.14	55,222.04	51,350.82
Total expenses and return on investment.....	62,160.93	79,243.88	98,435.46	94,876.95
Amount paid by L. & P. Ry. for use of facilities of L. C. & N. R. R.....	16,182.57	18,386.84	20,850.32	19,513.68
Advantage to L. & P. Ry. Co. over owning and maintaining the property.....	45,978.36	60,857.04	77,585.14	75,363.32

The foregoing statement assumes that the traffic over the road would be only the traffic carried by the Louisiana & Pacific during the periods covered by the statement. But which ever way it is looked at—from the standpoint of the Southern Pacific losses or from the advantages which the Louisiana & Pacific secures—the concessions to this tap line far exceed any amount that can be explained upon any hypoth-

esis other than that this deal was a flagrant concession to the Long interests to secure 40 per cent of his traffic.

It must be observed that this road, maintained by the Southern Pacific, is also used in part as a logging road for the Calcasieu Lumber Mill, and from Lily Junction to Bon Ami for the King-Ryder Lumber Company, and from De Ridder Junction to De Ridder for the Hudson River Lumber Company.

Next comes the cash concession from the lumber rate. In the testimony taken before the Commission (Rec., p. 660), Commissioner Harlan inquired of Mr. Davis what the 4 cents per hundred pounds amounted to on an ordinary carload, to which Mr. Davis replied "20 dollars a car." One of the mills turned out 2,500 cars a year. This amounts to \$50,000 per annum, applying the 4 cents to the entire output. When we consider that 90 per cent of the entire output of each mill goes either to the Southern Pacific or the Frisco line, and that the allowance from the Frisco is greater than that from the Southern Pacific, the magnitude of this rebate clearly appears.

From the foregoing statement it will be seen that all the lumber mills operated by the several lumber companies in this case are located upon, and can be served directly by, main line railroads. Under the custom prevailing in this timber belt, as found by the commission, the main line railroads absorb the switching service to the mills and apply the

junction rate. There is, therefore, no sound reason why the Louisiana & Pacific Railway Company should operate over the rails of the Southern Pacific in handling lumber. This service of the Louisiana & Pacific does not add in the slightest to the public convenience. It is a burden superimposed by contract upon a main line carrier, and is a mere device to secure a concession from the published rates on lumber applicable to the traffic of these lumber companies. Main line roads, required by law to devote their entire capital to transportation, should not be burdened with a service and traffic which is fictitious and useless. The whole scheme is an unlawful device, to secure a rebate from the published rate on lumber. From the Southern Pacific side it is a "buying" of 40 per cent of the Long lumber traffic.

No. 831.

The Woodworth & Louisiana Central Railway Company, Limited, was chartered in 1900 under the laws of Louisiana, with a capital stock of \$25,000. It took over the logging road of the lumber company, as hereinafter described, at a valuation of \$88,000, for which it gave its notes. These notes are still unpaid, and no interest has been paid upon them. The notes are held by the lumber company. It is a mere agency of the lumber company.

It serves the mill of the Rapides Lumber Company at Woodworth, Louisiana, a station on the Iron Mountain Railroad. The logging road was constructed by

the Rapides Lumber Company and operated as a plant facility for a number of years. It extended some miles from the mill on the Iron Mountain Railroad into the timber lands owned by the mill company, and is used for the purpose of hauling logs from the timber to the mill to be manufactured into lumber. This track is narrow gage, and at present extends about 18 miles to a point from which unincorporated tracks are still operated directly by the lumber company. The right of way for the narrow-gage track is leased from the lumber company, but the track from the mill to a point shown on the map as Hineston is owned by the railroad company. It is operated for the purpose of conveying logs from the forests to the mill, this service being the same as the service originally performed by the mill company. In addition, there is a switch track from the mill at Woodworth to the Iron Mountain Railroad. This switch track was originally put in by the mill under arrangement with the Iron Mountain Railroad Company, and was operated by the Iron Mountain. The Woodworth & Louisiana Central acquired, in exchange for its notes, the interest which the mill had in this switch track, and undertook its operation.

The Woodworth & Louisiana Central, with capital furnished by Mr. Long, constructed a spur standard gage railroad from the mill eastward for six miles to La Moria, Louisiana, connecting with the Southern Pacific, Texas & Pacific, and Rock Island lines. This spur track was constructed for the purpose of conveying

lumber manufactured by the mill company to competing lines of railroad, the purpose, as stated, being to secure competition for their traffic.

The tap line has one standard gage and five narrow gage locomotives. The standard gage locomotive is used for switching the carloads of lumber from the mill to the Iron Mountain Railroad, a distance, as the record before the Commission shows, of twenty-five feet, and for delivering carloads of lumber from the mill to the railroad lines at La Moria, a distance of six miles.

About 95 per cent of the lumber moves through La Moria. The explanation is in the fact that the allowances out of the through rate from the Iron Mountain Railroad run from $1\frac{1}{2}$ to $5\frac{1}{2}$ cents, while the trunk lines connecting at La Moria allow from 2 to $5\frac{1}{2}$ cents. At the time of the hearing before the Commission the record shows that 40,707 tons of freight were handled for the lumber company during the fiscal year ending June 30, 1910, and 2,100 tons of outside traffic consisting of merchandise, farm products, and miscellaneous material, which included supplies carried to the mill and the milling camps. There is no passenger service.

LUMBER COMPANY.

The Rapides Lumber Company was organized and commenced operations many years before the organization of the Woodworth & Louisiana Central Railroad. Its business includes the cutting of timber and the manufacturing and sale of lumber. No logs are

shipped over the main line railroads; only lumber manufactured from the logs is delivered to the main lines for shipment to the markets. As a part of its business, and to cheapen the cost and facilitate business, the mill company constructed the narrow-gage tap line above described for the purpose of conveying the logs from its timberlands to its mill and conveying supplies from Woodworth to its lumber camps. It still continues to operate the narrow-gage road from Hineston into the timber, shown upon the map in yellow lines. At the time of the hearing, and for some time after the order in controversy was entered, the steel for these logging roads into the timber was supplied by the W. & L. Central. Since the hearing this has been changed upon the books of the company. The fact remains, however, that this narrow-gage road is operated precisely as it was operated by the mill company and for the same purpose, and without any money changing hands. The connection between Woodworth and La Moria is used entirely for putting the products of the mill upon the lines of three competing railroads; the line being more than three miles long, it is not a service which, by custom in this territory and in reference to this traffic, is absorbed by the main lines as a part of the service of transportation under the main-line group rate. It consists, therefore, of a plant facility performing a plant service in delivering the products of the mill to competing lines in order to secure greater allowances out of the regular rate and additional car

service. It is just as much a part of the business of the lumber company as it would be if this haul was made by teams. The rails and steam engine decrease the cost of delivery over team service, and are therefore used. It is a business proposition. The question before the Commission was simply whether the "divisions" for this service out of the main-line lumber rate was an unlawful device.

No. 833.

MANSFIELD RAILWAY & TRANSPORTATION COMPANY.

This company was incorporated in 1881 under the laws of Louisiana by the citizens of Mansfield. Two miles of track were constructed from the town of Mansfield to a connection with the Texas & Pacific Railroad at a point known as Mansfield Junction, to serve the town of Mansfield as a freight connection. No passengers are carried over this line, passengers being conveyed by stages.

About 1891, E. A. Frost and associates purchased the entire capital stock of this railway company for \$12,500, and about the same time purchased a large tract of timberland lying west of the line of the Texas & Pacific Railroad. These parties erected a sawmill at a point near Mansfield known as Oak Hill. The timber and the mill were held and operated by a corporation owned by Frost and his associates, known as the De Soto Land & Lumber Company, and the stock of the Mansfield Railway was held by this lumber company. Some six or eight

miles of logging roads were constructed from a connection with the mill into the timber. The Frost Lumber Company was organized and took over the property and business of the De Soto Company.

The tracks into the timber were used solely for conveying logs to the mill, and the mill was connected by switch with the Texas & Pacific Railroad. Lumber was shipped from the mill over this side track or connection, the cars being switched and the service absorbed by the main-line road.

At a point about $1\frac{1}{2}$ miles east of Mansfield a connection is made by a switch with the Kansas City Southern Railway.

In transferring the logging road to the Mansfield Railway & Transportation Company, the lumber company reserved to itself the free privilege of operating logging trains between the timber and the mill. No consideration was allowed for this; the full value of property transferred was exchanged for the outstanding capital stock to the amount of \$77,300, all of which, at the time of the investigation by the Commission, was held by the stockholders of the Frost Lumber Company. The railroad is indebted to the lumber company in the sum of \$216,806.97. The holdings of the stockholders in the Frost-Johnson Company and the tap line are identical.

There is a subsidiary corporation of the Frost-Johnson Company that performs the entire logging service. The lumber company assigned its trackage privilege over the tap line to the logging company. The Mans-

field Railway and Transportation Company owns one locomotive, a passenger coach, and one box car; the logging cars are owned by the subsidiary company that transports the logs.

In addition to the incorporated logging road, there are, in the aggregate, nearly 25 miles of unincorporated logging tracks in the timber.

FROST-JOHNSON LUMBER COMPANY.

As before stated, this corporation has been in existence for some time. It received the stock of the Mansfield Railway & Transportation Company and distributed it to its stockholders. It owns the subsidiary logging company and also the timberlands and mill. The mill is located at Oak Hill, about three-fourths of a mile from the junction with the Kansas City Southern Railroad, and $2\frac{1}{2}$ miles from the point of interchange with the Texas & Pacific Railroad. The mill is within 300 feet of the right of way of the Kansas City Southern, with which it formerly connected by a switch. After the organization of the Mansfield Railway Company, this switch was abandoned, and later taken up and the other connection made. The distance of the lumber movement from the mill to the main lines is (a) to the Kansas City Southern about three-fourths of a mile, and (b) to the Texas & Pacific Railroad about $2\frac{1}{2}$ miles.

Under the custom found by the commission to prevail in this territory the main-line roads absorb the service of switching or moving cars over the side tracks connecting with lumber mills where the

distance does not exceed 3 miles. Under this custom, therefore, the Frost Lumber Company can have its lumber taken from its mill by the Kansas City Southern Railway Company or the Texas & Pacific Railroad Company at the main-line rate; that is, without any switching charge. The Frost-Johnson Company's mill manufactures yellow-pine lumber. There is a hardwood mill adjacent to the mill of the Frost-Johnson Company, operated by the Mansfield Hardwood Lumber Company. This company buys a substantial portion of its timber from the Frost-Johnson Company or its subsidiary logging company. The price paid includes delivery at the hardwood mill. Such logs are hauled to the mill by the logging company under its trackage right in the same manner as the logs are hauled to the Frost-Johnson mill. The hardwood mill also obtains some logs along the Texas & Pacific Railroad, which are brought to the junction by the latter road and switched by the Mansfield Railway & Transportation Company to the mill at a charge of \$2.50 a car.

The original connection with the Kansas City Southern was about 300 feet long. This switch was taken out and a connection about three-fourths of a mile long was substituted. After the latter switch was made an arrangement was effected by which the Kansas City Southern undertook to pay the Mansfield Railway & Transportation Company divisions of 1 to 4 cents per 100 pounds. This was held by the commission to be "a mere manipulation of the

situation in order to establish a relation that is unlawful."

The tap line also crosses the right of way of the Texas & Pacific within a short distance from the mill, but the lumber is switched by the tap line back towards Mansfield, and then to the junction, making the distance $2\frac{1}{2}$ miles; the tap line receives from the Texas & Pacific 1 to 4 cents per 100 pounds.

It will be observed that in both instances the original short switch connections were taken out and longer connections were constructed. The purpose as found by the commission was to compel these main lines to make a greater allowance to the tap line out of the main line rate. This is a plain "device" to secure a rebate.

No. 835. 335.

VICTORIA, FISHER & WESTERN RAILROAD COMPANY.

This railroad was incorporated in November, 1902, under the laws of Louisiana. It is owned by the stockholders of the Louisiana Long Leaf Lumber Company. The railroad and lumber company have the same officers, and the capital stock of the railroad company, amounting to \$300,000,000, was issued as a dividend to the stockholders of the lumber company in exchange for the tracks and equipment then owned and theretofore operated by the lumber company.

The track of the railroad was constructed some 25 years ago as a logging road and was acquired by the present lumber company in 1900. It connects

with the Texas & Pacific Railroad at Victoria, Louisiana, and runs southward, crossing the Kansas City Southern at Fisher, and terminating at a point known as Cain, a distance of about 31 miles. There are about 25 miles of logging spurs and side tracks operated by the lumber company. The railroad has 5 locomotives, 4 cabooses, 3 box cars, 1 flat car, and 105 logging cars. It does not operate any trains on regular schedule.

The tap line hauls the logs from the woods to the mill, making a charge of \$1.50 per 1,000 feet which, it claims, covers the service performed on the logging spurs, and not on the haul over the main track. The lumber from the mill is switched about one-half mile by the tap line to the Kansas City Southern, and about 1 mile to the Texas & Pacific. It receives divisions out of the main line rates from both railroad companies, ranging from $\frac{3}{4}$ of a cent to 4 cents per 100 pounds, except on traffic moving to points in Texas, where $1\frac{1}{4}$ cents per 100 pounds is added to the junction-point rate.

The tap line does not carry passengers; and more than 99 per cent of the total tonnage for the year 1910 was furnished by the proprietary company.

THE LOUISIANA LONG LEAF LUMBER COMPANY.

This lumber company has two mills, one about a mile from the junction with the Texas & Pacific at Victoria, and another about half a mile from the tracks of the Kansas City Southern at Fisher. The Victoria mill has been in operation for about 25 years, and was

acquired by the present lumber company in 1900. The timber holdings of the company approximate 95,000 acres, in addition to which it owns 80,000 acres of cut-over land. The greater portion of the lumber manufactured at Fisher is delivered to the Kansas City Southern, while the greater part of the lumber produced at the mill at Victoria is delivered to the Texas & Pacific Railroad. A small amount of lumber from each mill moves over the tap line to the more distant trunk line.

The organization of this tap line and its operation did not change the service theretofore rendered; that service was a part of the business operation of the lumber company. It is still a plant or business service. The organization and changes made was a device to secure rebates.

TOTAL LUMBER TONNAGE OVER THESE FOUR TAP LINES.

The evidence before the Commission shows that the lumber tonnage of these several tap lines is as stated below. The carloads are figured on the basis of 25 tons per car.

	Tons	Equivalent in carloads on a basis of 25 tons per car.
Louisiana & Pacific Ry.....	243,122	9,725
Mansfield Ry. & Transportation Co.....	28,506	1,140
Victoria, Fisher & Western R. R.....	316,416	12,657
Woodworth & Louisiana Central Ry.....	39,773	1,591
Total.....	627,817	25,113

Taking Mr. Davis's statement that the "divisions," under the Southern Pacific contract, would be \$20

a car, and applying that to the whole traffic, it would amount to \$502,340. An average of half that rate would amount to a yearly profit of over a quarter of a million dollars. And this comes out of the lumber rates applicable from the junction points. To the extent of these allowances these Long lumber companies are preferred over their competitors and railroad revenues are that much depleted.

The extent of these practices, the importance of the subject, and the far-reaching effect of the tap-line decision is suggested by the following from the Commission's report (p. 282):

Of the 2,208 industrial lines of all classes that were examined in the course of the general investigation referred to, it was found that some 1,251, incorporated and unincorporated, were tap lines owned by or closely affiliated with companies engaged in different parts of the country in the manufacture of lumber and forest products. Of these so-called railroads only 243 were found to be receiving allowances from the public carriers. On the other hand, 1,008 were receiving no allowances of any kind. The 243 lumber companies that were beneficiaries of such contributions from the public carriers were operating, through their tap lines, 5,787 miles of track, while the tap lines of the 1,008 other mills receiving no aid from the public carriers were operating 12,358 miles of track. These figures fairly lead to the inference that it is the larger lumber companies with their larger traffic that receive allowances, while the

smaller concerns are compelled to get along without such contributions from the public carriers.

These 1,251 lumber mills in different parts of the country are operated under different conditions and manufacture lumber of different kinds and classes. It must be remembered, nevertheless, that they are all in competition with one another in the general lumber markets of the country. But limiting our comments to the conditions that exist west of the Mississippi River in the three States of Arkansas, Texas, and Louisiana, where the lumber industry is confined largely to yellow pine, we find that the public carriers, at the time our investigations were brought to a conclusion, were making allowances out of the rates to 112 tap lines, while 143 tap lines were receiving no such contributions.

QUESTIONS INVESTIGATED.

The investigation by the Commission had in view, and for its purpose, the ascertainment of all evidential facts bearing upon, and the determination from the facts of, the questions—

(1) Whether the giving of these divisions constituted in any case a rebate; and

(2) Whether, in a case where a tap line is a common carrier but wholly owned by a proprietary lumber company, a division with the tap line, upon the traffic of the proprietary lumber company, constituted, in whole or in part, unjust and undue discrimination in favor of the proprietary lumber company and against its competitors in the same field.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

TAP LINE CASES

No. 829.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

vs.

LOUISIANA AND PACIFIC RAILWAY CO. ET AL.

No. 830.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

vs.

LOUISIANA AND PACIFIC RAILWAY CO. ET AL.

No. 831.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

vs.

WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY
ET AL.

No. 832.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

vs.

WOODWORTH AND LOUISIANA CENTRAL RAILWAY COMPANY
ET AL.

No. 833.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

vs.

MANSFIELD RAILWAY AND TRANSPORTATION COMPANY
ET AL.

No. 834.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

VS.

MANSFIELD RAILWAY AND TRANSPORTATION COMPANY
ET AL.

No. 835.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
APPELLANTS,

VS.

VICTORIA, FISHER AND WESTERN RAILROAD COMPANY ET AL.

No. 836.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
APPELLANTS,

VS.

VICTORIA, FISHER AND WESTERN RAILROAD COMPANY ET AL.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE RAILROAD COMMISSION OF LOUISIANA,
INTERVENOR AND APPELLEE.

STATEMENT.

The questions here presented, being public in their nature, and not merely private controversy, are of great interest to the people of the State of Louisiana.

The interests of the public of the State of Louisiana in the fundamental questions involved in these cases have at all times been regarded by the Railroad Commission of Louisiana as sufficient to impel its appearance before the Interstate Commerce Commission, before the Commerce Court, and now before this great final court.

Hundreds of miles of standard gauge, splendidly maintained, and well-operated railroads, representing investments in Louisiana running far into the millions, will be affected by the decision in these cases.

The prosperity of the South depends upon its agricultural development. It is essentially an agricultural section. Where once stood the silent forests, will in future rise the homes of farmers, and the soil that has produced the finest timber in the world will become, and is fast becoming, a great agricultural country, producing crops that annually run into millions in value. This sort of development has followed the railroads, naturally, because it depends upon transportation for its success.

Transportation is the forerunner of all agricultural and manufacturing development. It is trite to say that the most commonplace and worthless articles are often given a great value by simply transporting them to a market. Sand is valueless while lying on the river bank, but becomes a valuable commercial product when transported to a city. Gravel in the river bed is worthless; farms are not prosperous unless near a river or a railroad, and, without transportation, trees in the forests are useless. Transportation is necessary to give them a

commercial value, and so railroads had to be built to transport them to a sawmill.

HISTORY OF THE LOUISIANA TAP LINES.

The four Louisiana companies which are attacked as mere devices for securing a rebate from their connecting trunk lines, are the

Louisiana and Pacific Railway Company,
Mansfield Railway and Transportation Company,
Victoria, Fisher and Western Railroad Company,
Woodworth and Louisiana Central Railway Company.

Each of these companies is a railway corporation, duly chartered, incorporated and existing under the laws of the State of Louisiana.

They have complied with the laws of the State of Louisiana, the Rules and Regulations of the Railroad Commission of Louisiana, and with the Federal laws governing railroads.

These cases involve the question as to whether the appellee railroad companies are common carriers or merely plant facilities.

That they are useful as a means of converting the wildernesses of Louisiana into farms that produce varied crops of high commercial value, and thereby induce immigration to the State, has been admitted time and again in the voluminous record now before the Court.

Many of the early railroads of this country occupied much the same position as the "tap line" railroads now occupy. Small railroads pioneered the civilization of the South and Southwest. Specially was this true in the State of Louisiana. The charters of the first railroads built in the State of Louisiana were all special charters by Act of the Legislature, and the railroads built under these charters were, in the first instance, built to carry the products of the farms out to the steamboat landings on the Mississippi River. They were owned by the same men who raised the crops that were shipped over them. The demands for rail transportation have always been promptly met by some one who had the enterprise to meet the situation. Long before any trunk lines were built through the State of Louisiana there were numerous short lines in operation, connecting the rivers with the interior. As early as 1833 the Pontchartrain Railroad, four miles long then, and no longer now, operated between Lake Pontchartrain (Spanish Fort) and New Orleans, and it was then owned and operated by the merchants of New Orleans as a facility for bringing in their freight which came by ship from foreign countries and coastwise states through the lakes, to the rear of the city.

There was not much development in the lumber industry until about the early nineties. Following a great exploitation of the timber resources of the State, inaugurated at the Cotton Centennial Exposition in 1884, at New Orleans, a wave of investment swept over the South. Realizing the value of the vast forests, north and south railroads were extended into them and the lumber industry of Louisiana began to grow until it reached tremendous proportions. For years the development of the lumber industry was confined to the forests adjacent to the existing trunk line railroads. These lines were the recipients of the benefits from the transportation of both logs and lumber. They were extended into new territory, and as they were lengthened, the locations of the mills were changed. This continued until the timber adjacent to the right of way of the railroads was cut, and the distance between the rails and the forest became too great for a team haul of the heavy logs.

As long as the timber was along the line of the trunk line railroad, the logs were often hauled by the railroad to the saw mill, there cut into timber, and the timber reshipped to its final destination. There was a milling-in-transit arrangement in many cases, which covered the movement of the logs to the mill and the lumber from the mill to its destination.

just as it was handled over the tap lines in connection with the trunk lines previous to the cancellation of the through rates and divisions applying on logs and lumber. When the tap lines were built, the arrangement was extended to the end of the tap line.

As transportation was necessary to haul the logs from points on the trunk lines to the saw mills, it was equally necessary when the space between the timber and the trunk line became so great as to render team hauls impracticable. Railroad extension, therefore, to the timber line, became necessary. The trunk lines were unwilling to extend their railroads. Had they done so, the hauling of the logs from the forests to the saw-mill over their branches would never have been questioned as a transportation service by a common carrier railroad. The railroads themselves often owned large tracts of timber lands. Their owners were also owners of saw mills and forests. This is true to-day. The Santa Fe is a saw mill owner as well as a railroad owner. The large saw mill at Merryville, Louisiana, is a Santa Fe property, and the logs which are sawed into lumber at the Santa Fe's Merryville plant are also the logs of the Santa Fe Railroad Company.

The trunk line railroads were unwilling to build branches to the forests to get the logs for the saw mills, so this work had to be undertaken by some one

else. Naturally the interested parties, the owners of the timber and the saw mills, built the lateral railroads to reach their timber and to afford the transportation necessary to get their products to the markets. When these lateral railroads were built, the trunk line railroads extended their rates so as to cover the movement over the tap lines.

Then arose the question as to whether the railroads belonging to lumber companies, whether incorporated or not, were common carriers of interstate commerce, which might participate in through rates and divisions with trunk line common carriers—common carriers of the logs and lumber belonging to their stockholders, as well as common carriers of other freight.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

The first inquiry undertaken by the Commission as to the right of a tap line to participate in through rates and receive a division thereof, was upon its own motion, in re **Transportation of Salt from Hutchinson**, 10 I. C. C. Rep. 1. Informal complaint was made to the Commission that the Hutchinson & Arkansas River Railroad, while not a railroad in fact, was receiving divisions of the rate for the transportation of salt from Hutchinson, Kansas.

In that case the Hutchinson & Arkansas River Railroad Company, a Kansas corporation, was organized to build a railroad; but it did not build a railroad. It simply purchased sidetracks at Hutchinson, connecting the mills of the Hutchinson, Kansas, Salt Company with the tracks of the Santa Fe. It owned no equipment; it issued no bills of lading; it performed no service. It was held that the allowance of a division of a through rate with this corporation was illegal. The case can not, therefore, be cited in support of the Commission's action in declaring illegal the divisions allowed the Louisiana & Pacific Railway Company, the Mansfield Railway & Transportation Company, the Woodworth & Louisiana Central Railway Company, and the Victoria, Fisher & Western Railway Company. Conditions are entirely different.

The next case in which the question whether allowances from the published rate made by the railroads west of the Mississippi River to logging roads or "tap lines," as they are called, owned or controlled by the lumber mills, constituted departures from published rates in violation of the Act to regulate commerce, was the case of **The Central Yellow Pine Association vs. The Vicksburg, Shreveport & Pacific Railroad Company**, 10 I. C. C. Rep. 193.

Speaking generally of the tap lines in the Southwest, the Commission, in this case says:

"While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight." (Ibid. 199.)

* * * * *

"The division does not seem to be in any case as great as the actual expense of transporting the logs to the mill." (Ibid. 199.)

* * * * *

"It requires about four carloads of logs to produce one of lumber, and the expense of transporting the logs to the mill is, therefore, considerably greater than would be the cost of carrying the lumber if that were manufac-

tured at the point where the log is taken up. It hardly seems, however, that most of these divisions could be regarded as excessive if the mill were located in the forest and the tap line treated as the initial road in transporting the lumber from there to destination." (Ibid. 199.)

The opinion in this case was handed down by Commissioner Prouty. Its conclusions support our contentions in every syllable. From it we excerpt the following:

"Rates throughout this southern lumber-producing territory are blanket rates—that is, they are the same from all points of production upon the various lines of railway to a given destination. Now, when the traffic manager of the Kansas City Southern was approached and asked to extend his line to the tract of timber which Mr. A. possessed, it is apparent that he might have elected to do so. That company might have constructed a branch line of the necessary length, might have located a station at the terminus where the mill stood, and might have applied the same rate on lumber from that station which obtained from other stations upon its line. Indeed, it would have found some difficulty, in view of the system universally in vogue, in applying a higher rate from that mill than was made from all southern territory."

* * * * *

"Mr. A. finds it impossible to interest others in the construction of this railroad, and

thereupon he takes the stock himself. The road is built and operated exactly as though the ownership of it and the mill were independent, but in fact the same person owns the two. It seems clear to us that this fact can make no difference; that the mill of Mr. A. may be accorded the same through rate that is accorded to a mill located at the junction point, and the branch road allowed a sufficient division to compensate it for transporting the lumber from the mill to the main line, provided that the rate is a joint rate between two common carriers."

* * * * *

"It is not the fact that lumber and not logs has been transported to the junction point, nor that this lumber has been carried there by a railroad, which justifies the payment of the division; but, rather, the fact that the railroad which furnishes this service is a common carrier, and that the rate from the mill is a joint rate between these two carriers."

* * * * *

"These mills are usually located at the junction point and not upon the logging road. This is primarily due to the manner in which the development of the sawmill industry has proceeded; but there are also many reasons why, if the mill were to be located anew, it would be better to place it beside the main line rather than at the end of the branch line."

"We are clear that one of these defendants (**trunk line railroads**) may do upon a branch line constructed and operated by it whatever it could do upon its main line, and that it might accomplish under a joint rate with an independent railway carrier whatever could be done upon its own branch line. The real question is, therefore, can a railway which receives logs at a point upon its line, and transports these logs to a sawmill, where they are manufactured into lumber, treat the lumber as originating where the log did, and make such allowances towards the transportation of the logs as would be a fair compensation for hauling the lumber from that point? In other words, can the principle of milling in transit be applied to the manufacture of logs into lumber?"

* * * * *

"It is well understood that at the present time this principle is applied to the movement of many commodities."

* * * * *

"Such practices were, however, in use to a considerable extent at the time of the passage of the Act and since then they have become universal. To abrogate these privileges would be to confiscate millions of dollars in value by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that when the product finally goes forward to the point of

consumption it but completes the journey upon which it entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation and probably of manufacture."

* * * * *

"The practice which is attacked has grown up with the development of the lumber industry and seems on the whole to have been beneficial to the country in which it exists. Its effect is to bring into market lands not otherwise accessible, to decrease the cost and stimulate the production of lumber, thereby benefitting the entire public. Values have adjusted themselves to this situation. Lands have been purchased, mills located, large amounts of money invested upon the theory that the system would be continued. While the mill owner has no legal vested right of this sort which he can assert, there is a moral obligation resting upon the railway company to continue the practice, if it can do so legally. So far as can be seen, the mill owner, the railway, the purchaser of lumber are all benefited. It seems plain to us that we ought not to interfere unless the positive mandate of the law requires it, and with considerable hesitation we conclude that it does not."

* * * * *

"If the logs were shipped from a point upon the main line of one of these defendants to the mill at the local rate, we do not think

that an adjustment of the rate in and of the rate out, when the lumber went forward, which would treat the lumber shipment as originating where the logs did would be illegal as a matter of law."

* * * * *

"Once admitting the legality of the principle of milling in transit, whether it shall be extended to a particular case, must depend largely upon the facts. Under all the circumstances disclosed by the record before us we think that this practice may be permitted here but this holding extends the application of that principle to the extreme limit."

* * * * *

"What we hold is that the shipment of the log to the mill and the lumber from the mill may, under the circumstances of this case, be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered, and that the carrier may make such allowance toward the cost of moving the log as would be fairly involved in moving the lumber from that point, and that it may do this by a joint arrangement with the carrier bringing the log to the mill, **provided that carrier is a common carrier by rail.**"

* * * * *

"It will be noted that in our opinion these divisions can only be granted when the logging road is a public carrier which actually

makes a joint through rate, and it was urged in argument that there can be no difference in effect between a common carrier which brings these logs to the mill and a private carrier which discharges the same service. It would be a sufficient answer to this that the law permits the allowance in one case and not in the other, but there is a practical answer as well. The common carrier is subject to public control, its tariffs must be filed according to law, it must report to governmental authority, it must obey the law obligatory on such common carriers. These logging roads develop with the country, passing by almost imperceptible progress from carriers of logs to carriers of general merchandise and often of passengers. The same considerations which require that railroads in general should be subject to public supervision apply to these lines."

* * * * *

"We think, therefore, that the tariffs should state upon their face that the transportation provided for covers the carriage of the log to the mill, and that the division which is allowed the tap line should in all cases be named."

* * * * *

"To become a common carrier within the purview of this case the tap line must clearly file its tariffs and render its statistical report to the Commission.

And thus the matter rested from March, 1904, until the decision of the Commission in **Star Grain & Lumber Company et al v. Atchison, Topeka & Santa Fe Ry. Co. et al.** (14 I. C. C. Rep. 364, 17 I. C. C. Rep. 364). In the interim, however, in the case **In the Matter of Divisions of Joint Rates** (10 I. C. C. Rep. 385, decided November, 1904), the Commission held that ownership of a railroad by its largest individual shipper was not prohibited by the Act to regulate commerce.

"The mere fact that this road (**Illinois Northern Railroad**) is to-day entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper, is not, in our opinion, controlling against the legality of the transaction before us."

In that case it was held that an industrial railway, however short it may be, if actually operated independently with its own locomotives and cars, is a common carrier, though it is operated for the exclusive benefit of the industrial enterprise which owns it. This is certainly the case where it accepts such general traffic along its line as may be offered it.

Of the Illinois Northern Railroad, the Commission, by Commissioner Prouty, said:

"The Illinois Northern Railroad is a common carrier within the first section of the Act to regulate commerce. It is incorporated as

a railroad company under the laws of Illinois. It actually owns and operates a line of railroad. It maintains a freight station, at which it receives and delivers for the general public considerable quantities of less than carload freight. Its main business is the moving of loaded cars to and from various industries along its line, and in this capacity it serves more than a hundred plants, besides that of the International Harvester Company. Manifestly, there is no reason in law why this railroad may not make joint rates, file joint tariffs and agree upon joint divisions as other railroads do."

Immediately after these decisions were rendered the short line lumber railroads and the trunk lines with which they connected adjusted their rates and tariffs and arranged their accounts to meet the plain requirements of the Interstate Commerce Commission.

In the Star Grain case the history of the tap lines was again in the making, and the Commission announced that it would make an investigation into these tap lines and the character of the transportation which they conduct, having reference to the tap lines generally. This, notwithstanding the very thorough exposition of the tap line situation as made by the Commission in its decision in the Central Yellow Pine case, 10 I. C. C. Rep. 193. The principles laid down in that case, and the actions of the tap lines

to comply with them, were immediately put in doubt by the decision in the Star Grain case.

Out of the Star Grain case grew the general investigation into the tap lines, in the proceeding instituted by the Commission upon its own motion, entitled, **"In the Matter of Tap Line Allowances; Investigation and Suspension of Schedules Cancelling Existing Through Rates on Certain Tap Line Connections,"** which resulted in the decision rendered by the Commission April 29, 1912, and its Supplemental Report of May 14, 1912. (23 I. C. C. Rep. 277, and 549.)

The manner in which logs and lumber were handled by the tap lines was not materially different in 1904 than in 1908, when the Star Grain case was decided. Changes were made in the manner of publishing tariffs and filing them with the Commission, so as to have them conform to law, yet the practices which were approved by the Commission in 1904 in the Central Yellow Pine case (10 I. C. C. Rep. 193) were rejected by the Commission in its decision in the Tap Line Case (23 I. C. C. Rep. 277 and 549).

The opening paragraph of the Commission's opinion in the Tap Line Case defines an industrial railroad, and later in the opinion it is stated that—

"These small railroads, owned by or affiliated with lumber companies and commonly referred to as tap lines, although different from other lines in many respects, are generally classified as industrial railroads."

"An industrial railroad," says the Commission, by Commissioner Harlan, "as that phrase is now commonly used, is a short line constructed primarily to serve a particular plant or industry in the general interest of which it is owned and operated. It consists of the tracks connecting the various factories, warehouses and other buildings of the industry with one another, and ordinarily has a connection with one or more adjacent trunk lines by means of a track leading from the plant to their rights of way. It serves the industry by receiving its in-bound shipments of raw materials from the trunk lines at agreed interchange points, distributing them among the various buildings according to the requirements of the manufacturing operations, by taking the finished products from the plant to the trunk lines; it is also often in a position to effect all the necessary movements of materials and partially finished products from building to building within the plant. The rails, tracks, and locomotives are most frequently operated as a bureau of the industry, and no pretense is made of serving outside interests. In recent years, however, a practice has grown up under which the rails, tracks, and locomotives operated and used in and around an industrial plant, when set over to a small incorporated railroad company organ-

ized for the purpose and owned by the industry or in its interest, are thereafter dealt with by the regular lines as something wholly apart from the industry, and as if they constituted a common carrier in the service of the general public, participating on an equal basis with other carriers in the transportation of the traffic of the country. On this theory of their status many industrial lines receive allowances out of the rates both on the traffic of outside interests as they may handle."

From this definition of an industrial or so-called tap line railroad we unhesitatingly contend that the four railroad companies, plaintiffs in the proceedings now before this court are entitled to full recognition as common carriers which should receive the reasonable allowances out of through interstate rates on the logs and lumber which they handle for their proprietary companies, as well as on the other traffic which they handle.

The facts concerning each of the tap line railroads, appellees, being specifically set forth in their respective briefs, are not repeated here.

The interest of the State of Louisiana in these cases lifts them from the category of mere private controversy and places them on the plane of public questions.

The questions to be decided are of unusual interest to the citizens of the State of Louisiana, since not

only is the mere status of these railroads to be solved, but the value of a charter granted under the authority of the State of Louisiana is to be tested, and the interests of shippers who have invested fortunes in Louisiana properties are to be passed upon. The lumber and timber products industry is by far the most extensive industry in the State of Louisiana. The value of the output of the various mills engaged in manufacturing the products of timber is only exceeded by the value of the combined industries of manufacturing sugar and molasses, which includes the refining of sugars brought into the State from Cuba and Porto Rico. In 1909, the lumber industry gave employment to an average of 46,072 wage-earners, and the value of its products amounted to \$62,838,000, these figures representing 60.5 per cent of the value of all products, and 28.1 of the number of wage-earners employed by the varied industries of the State. At the present time it ranks first in relation to the number of wage-earners employed, and second in value, among all of the industries of the State of Louisiana.* The tonnage hauled by the railroads of Louisiana of freight originating in the State is largely composed of shipments of logs and lumber, a great majority of which originates

***Note.**—Supplement for Louisiana, Abstract of Thirteenth Census of the United States (1910).

on some one of the short lines which are designated "tap lines." In fact, for the year ending June 30, 1911, logs and lumber constituted 60 per cent of the tonnage hauled by railroads in Louisiana.

THE CONSTITUTION AND LAWS OF THE STATE OF LOUISIANA.

The following are taken from the Constitution and laws of the State of Louisiana relating to railroads:

Constitution, Art. 271. "Any railroad corporation or association organized for the purpose shall have the right to construct and operate a railroad between any points within this State and connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." (Constitution 1879, Art. 243.)

Constitution, Art. 272. "Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers." (Constitution 1879, Art. 244.)

Constitution, Art. 273. "Every railroad or other corporation, organized or doing business in this State, under the laws or authority thereof, shall have and maintain a public office or place in this State for the transaction of its business, where transfers of stock shall be made, and where shall be kept for public

inspection books in which shall be recorded the amount of capital stock subscribed, the names of owners of stock, the amounts owned by them respectively, the amount of stock paid, and by whom, the transfers of said stock, with the date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers." Constitution 1879, p. 245.

Revised Statutes, Sec. 1479. "Whenever the State or any political corporation of the same, created for the purpose of exercising any portion of the governmental powers in the same, or the board of administrators or directors of any charity hospital, or any board of school directors thereof, or any corporation constituted under the laws of this State for the construction of railroads, plank roads, turnpike roads or canals for navigation; or for the construction or operation of waterworks or sewerage to supply the public with water and sewerage, or for the purpose of transmitting intelligence by magnetic telegraph cannot agree with the owner of land which may be wanted for its purchase, it shall be lawful for such State, corporation, board of administrators, directors or person to apply by petition to the District Court in which the same may be situated, or if it extends into two districts, to the judge of the District Court in which the owner resides, and if the owner does not reside in either district, to either of the District Courts, describing the land necessary for the purposes, with a plan of the same, and a statement of the improvement thereon, if any, and the name

of the owner thereof, if known at present in the State, with a prayer that the land be adjudged to such State, corporation, board of administrators or directors upon payment to the owner of all such damages as he may sustain in consequence of the expropriation of said land for such public works; all claims for lands or damages to the owner caused by its taking or for expropriation for such public work shall be barred by two (2) years' prescription, which shall commence to run from the date at which the land was actually occupied and used for the construction of the works." (As amended by Act 227, 1902, p. 457.)

Articles 284 to 289 of the Constitution of the State of Louisiana place all railroads under the supervision of the Railroad Commission, and Act No. 195 of the Legislature of the State of Louisiana of 1906 makes it the duty of the Railroad Commission to appear before the Interstate Commerce Commission whenever in the judgment of the Railroad Commission the interests of shippers or consignees in the State of Louisiana may require it.

Article 230, Constitution of 1898, second and third paragraphs:

"There shall also be exempt from taxation for a period of ten years from the date of its completion any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1st, 1904; provid-

ed, that when aid has heretofore been voted by any parish, ward, or municipality to any railroad not yet constructed, such railroad shall not be entitled to the exemption from taxation herein established, unless it waives and relinquishes such aid or consents to a re-submission of the question of granting such aid to a vote of the property taxpayers of the parish, ward, or municipality, which has voted the same, if one-third of such property taxpayers petition for the same within six months after the adoption of this Constitution.

“And, provided further, that this exemption shall not apply to double tracks, sidings, switches, depots or other improvements or betterments, which may be constructed by railroads now in operation within the State, other than extensions or new lines constructed by such railroads; nor shall the exemption hereinabove granted apply to any railroad or part of such railroad, the construction of which was begun and the roadbed of which was substantially completed at the date of the adoption of this Constitution.”

By amendment, the exemption was extended to all railroads built in the State of Louisiana after January 1st, 1904, and prior to January 1st, 1909, for a period of ten years.

These laws indicate the effort which the State of Louisiana has made to increase its railroad mileage.

Congress, realizing the great importance of the short tap line lumber roads in the development of the

Southwest, excepted from the commodities which a railroad company might not own "timber and the manufactured products of timber."

So that both Congress and the State of Louisiana have recognized in a most emphatic manner the value of the lumber roads as a means of developing the sections in which they operate, and they have, by the State of Louisiana at least, been encouraged by substantial assistance in exemptions from taxation for long periods.

THE POSITION OF THE RAILROAD COMMISSION OF LOUISIANA IN THESE CASES.

When the Interstate Commerce Commission was conducting its investigation into the tap lines of the Southwest, the State of Louisiana, through its Railroad Commission, promptly intervened, presented testimony, filed a brief and took part in the oral arguments. Following up the first steps which it took in an endeavor to protect the shippers of the State, whose interests are affected, it intervened in these cases when they were before the Commerce Court.

The policy of the State of Louisiana in inducing railroad building and extension was clearly stated by Mr. J. J. Meredith, then chairman of the Railroad Commission of Louisiana, in his testimony before Commissioner Harlan, taken at St. Louis, January

26, 1911. (Pp. 2037-2059, printed record, Vol. III.)
Commissioner Meredith made this statement:

“I desire to state that after consultation with the Attorney General of the State of Louisiana, who is the legal advisor of our State Railroad Commission, that we decided to enter a formal protest and intervention before this Commission against the cancellation of through rates and divisions between the trunk lines and the branch lines and the so-called tap lines of the State of Louisiana.

“In explanation, the Constitution of the State of Louisiana creating the Railroad Commission gives it power to fix just and reasonable rates for the transportation of freight and passengers over the lines of railroad within the State of Louisiana, and to regulate and fix joint and through rates between the trunk lines of the State and the branch lines or short lines of the State of Louisiana. The Supreme Court of the State of Louisiana has defined a railroad or common carrier to be a railroad that has complied with the laws of the State of Louisiana by taking out a charter, by filing schedules and tariffs and otherwise complying with the laws of the State of Louisiana governing railroads and transportation. The statutes of the State of Louisiana, No. 195, of the Acts of 1906, makes it the duty of the Railroad Commission of the State of Louisiana to appear before the Interstate Commerce Commission whenever in their judgment there is any matter to be considered affecting the rates of transportation within the State of Louisi-

ana. It has been the policy of the State of Louisiana for some years past to encourage immigration and the investment of capital. This policy has not only been expressed by public sentiment everywhere, but it has been crystallized in the statutory legislation. Our Legislature passed an act exempting all lines of railroad from taxation that were built within a certain period of time—I believe for the period of ten years—and since that time on the expiration of this time the act has been revived and the time extended for another period of ten years. The people of the State of Louisiana in various sections of the State have also voted special taxes to different roads as an inducement and an encouragement to build through certain sections of the State. Louisiana has long suffered from the want of immigration and the investment of capital, and under the laws of our State the Railroad Commission not only deems it wise but their official duty and also their moral duty to lend whatever support and protection they can to the perpetuation of the short lines already built within our State that have complied with the laws of the State of Louisiana governing railroads and to encourage the building of other railroads in the future. There are various short line railroads against which complaints have been filed before our Commission complaining of the service rendered and the equipment furnished, and our Commission has assumed jurisdiction over these roads, issued orders at various times which have been complied with, none of which, I believe, that I can recall at this time have ever been contested. I

remember especially in September, 1909, when the great storm swept across the southern portion of the State of Louisiana, it blew down great forests of pine timber which was very valuable to the owners, and the owners of this timber petitioned to the Railroad Commission asking for more equipment and for extended facilities in this emergency in order to utilize the timbers before they should decay and go to destruction from worms and other causes. This complaint was made against the Kentwood, Greensburg & Southwestern Railroad, a short line of railroad connecting the Illinois Central in the southern part of our State. Some of this timber belonged to local citizens there within the parish, and some of it belonged to non-residents and parties living at a distance. Our Commission issued an order for the extension of side track facilities for the purchase of more cars and the quick transportation of this lumber, and the order was complied with."

Commissioner Harlan: "You speak of the transportation of lumber. Was it lumber or logs?"

Commissioner Meredith: "Both lumber and logs. We have also had application from other short lines of railroad against the service, asking for a change of schedule, asking for better accommodations for passengers, in which we have ordered the company to procure additional equipment and furnish adequate facilities for the business tendered to its line. These orders have been complied with."

"I desire to state further that my statements are intended to be confined to those lines of railroad that have complied with the laws of the State of Louisiana governing railroads and common carriers. I believe that is about all the statement I care to make."

Commissioner Harlan: "Are the complaints and orders you refer to preserved in the archives of your Commisison?"

Commissioner Meredith: "Yes, sir."

Commissioner Harlan: "And were the orders entered in connection with the complaints which have been filed since you have been a member of the Commission?"

Commissioner Meredith: "Yes, sir."

Chairman Meredith then reviews the history of the development of various railroads in Louisiana, tracing their origin to the short lumber railroads, first built to serve only the mills with which they were then connected, and then extended and converted into common carriers, eventually assuming their places in the transportation system of the State as parts of their main lines or important branches.

As Chairman of the Louisiana Commission, he stated that he believed that a division of joint through rates would be cheaper to the consumer than it would be to pay the rate to the trunk line, and then the local rate over the short line, and representing the general interests of the country, the Louisiana

Commission was of the opinion that a division of joint rates would be for the best interests of the country. (P. 2044Tr. of Testimony.)

The testimony of Chairman Meredith is of more than passing importance. It is the voice of a sovereign State speaking through its official, seeking to place fairly before this Court the general character of the Louisiana & Pacific Railway, the Mansfield Railway & Transportation Company, the Victoria, Fisher & Western Railroad, and the Woodworth & Louisiana Central Railroad.

This official had no interest to serve except the public. He was familiar with the conditions under which these railroads are operated, and his opinion is entitled to great weight. He says that these railroads are performing the services of a common carrier. They have a small portion of the public to serve. They are complying with the laws, and are treated as common carriers by the governing bodies of the State which gave them their charters.

Eminent counsel will contend no doubt that these are all questions of policy to be dealt with by the State, which in no manner binds the Interstate Commerce Commission or the Courts in reviewing its orders. But these are not entirely questions of policy. These officials testify that they have been able to enforce their orders against these railroads; that they have demanded and received an adequate

service for the public, scant though it may be, not by reason of courtesy on the part of the owners of these lines, but because they are common carriers, subject to the law's penalties for violating the mandates of the federal and state commissions. Can railroads so organized and operated be common carriers as to one and not as to all—common carriers as to some freight and not common carriers as to other freight, subject to control by the Interstate Commerce Commission in the enforcement of its orders and rulings relative to making reports and filing tariffs **as common carriers**, yet declared by the Commission as performing a transportation service as to one portion of its patrons and not as to all?

The position of the Railroad Commission of Louisiana, summarized, is that the Louisiana & Pacific Railway, the Mansfield Railway & Transportation Company, the Victoria, Fisher & Western Railway, and the Woodsworth & Louisiana Central Railway, by every test of law, in fact, as well as in name, are common carriers. There has been no question raised as to their status in the State of Louisiana, and as to the intrastate traffic which they handle they are recognized as common carriers by every official body dealing with public service corporations in the State of Louisiana. They are treated as common carriers by the Railroad Commission of Louisiana, and as to

some of their interstate traffic by the Interstate Commerce Commission, to whom they make annual reports in accordance with prescribed forms, and with whom they file tariffs under its rules. They have been treated so by the State Board of Appraisers, whose duty it is in the State of Louisiana to assess the value of railroad property. Portions of their lines have been exempted from taxation by virtue of their being common carrier railroads. They exercise the power of eminent domain granted by the State, by expropriating property for railroad purposes. They have been so treated by the great trunk lines with which they connect, by the making of joint through rates and the handling of through shipments. They have been so treated by the courts which have entertained suits filed against them for damages growing out of their negligence, and, in one instance at least, the Louisiana & Pacific Railway Company has been so treated by the Interstate Commerce Commission and the United States, which have, through their attorneys, prosecuted the company for a violation of the Federal Safety Appliance Act.

* * * * *

By virtue of the law they are entitled to make joint through rates, and the making of joint through rates carries with it the necessary obligation on the part of the connecting line of allowing a fair division

to the road which originates the tonnage. This principle is so well founded in the jurisprudence of this country that argument on this point seems unnecessary. They have track connections with the trunk lines which they meet and cross. They are required to receive and transport the cars and tonnage of their connections.

By declaring that the Louisiana & Pacific Railway Company, as to the logs and lumber which it handles for the lumber companies whose stockholders own a controlling interest in the railroad, is a mere plant facility and not a common carrier, the Commission has struck the vital spot of the corporation. To deprive the Louisiana & Pacific Railway Company of a fair division out of a through interstate freight rate on the lumber and logs which are shipped by the proprietary lumber company, is to deprive it of its principal source of revenue.

It is admitted in the decision of the Commission that the cancellation of the through rates and divisions will have the effect of greatly reducing the "tap line" earnings, and the inevitable result will be that the local traffic must, in the end, bear the entire burden of paying all the operating expenses and fixed charges of the railway company.

When the testimony was taken, some two years ago, over 62 per cent of the tonnage of the Louisiana

& Pacific Railway Company consisted of logs, lumber and other traffic shipped by the lumber company, which owns a controlling interest in the railway company. Upon the other 38 per cent of the traffic, therefore, has rested the burden of producing enough revenue to pay the operating expenses, the fixed charges, and the interest on the investment of the railroad company. That this cannot be done is evident, because 62 per cent of its tonnage must be hauled without revenue. That the shippers and the State of Louisiana will suffer is a natural consequence. The shippers will suffer because the local rates must be advanced to a point where they will produce sufficient revenue to meet the expenses of the railroad company; and the State of Louisiana will suffer because its assessments are based upon not only the original cost of the railroad itself, but also on its revenues. These alone would be sufficient reasons to justify the State of Louisiana, through its Railroad Commission, in intervening in this case in behalf of the plaintiff railroad company.

But while the percentage of the shipments of timber and its manufactured products is now high, it decreases year by year, and the shipments of other freight increases. Eventually, the percentage of other shipments than timber and its manufactured products will predominate, and in but a few years

the railroad will be in the midst of a highly productive agricultural section. This is not problematical or speculative. It is the history of every trunk line and branch railroad in the timber regions of the South and West. In fifteen years most of the timber now standing will have been cut. There will be no inducement to trunk lines to extend branches into the cut-over lands, and unless the intervening time is utilized in developing them agriculturally they will decline in value. As railroads participating in revenues from joint hauls as well as from local business, on interstate as well as intrastate traffic, the tap lines can be utilized to develop the lands they traverse.

When the State of Louisiana grants a charter to a railroad company in good faith, it expects to receive in return from the railroad company an adequate service at reasonable rates. This service should extend to and include shipments destined to and coming from other States as well as shipments to and from points in the State of Louisiana. If a railroad company organized under the laws of Louisiana may, by a decision of the Interstate Commerce Commission, be limited as to the traffic it may haul as a common carrier, then the right of commerce to move freely in unobstructed channels between the State of Louisiana and other States becomes restricted. Congress never intended to prohibit legitimate rail-

road corporations from engaging freely in interstate commerce.

Many Important Railroads Now Operating in Louisiana Originated as Tap Lines.

From the tap lines in Louisiana have sprung some of the most important trunk lines of the State today. It is only by reason of the fact that these small lines in the beginning were able freely to handle interstate, as well as intrastate, commerce that this development has been possible. Having received its charter and proceeded to comply with the same by building its railroad, buying equipment and holding itself out to the public as a common carrier, the plaintiff railroads are entitled to grave consideration before they should be held to be mere plant facilities as to any of their traffic.

Railroads may be operated by individuals or by corporations, and their stock may be owned by individuals or by other corporations. There is no Federal or State law which declares that a railroad company cannot engage in interstate commerce by reason of any restriction on its stock ownership. When a railroad company is organized with the avowed purpose of constructing or operating a railroad, there is no restriction in the law preventing it from purchasing railroads already constructed, building new

railroads, or leasing railroads already built, and operating them as public carriers. As such carrier it has the right to make traffic arrangements with trunk line connections, which is simply saying, in other words, that it is free to contract with other railroads for the continuous carriage of its passengers, tonnage or cars in interstate journeys. The rates for such transportation must be reasonable.

The laws of the State of Louisiana require carriers to operate their lines in accordance with the reasonable rules and regulations of the Railroad Commission of Louisiana, and consequently the Louisiana & Pacific Railway Company, the Woodworth & Louisiana Central Railway Company, the Mansfield Railway & Transportation Company, and the Victoria, Fisher & Western Railway Company must continue to operate their lines, although they have been deprived of an important source of revenue by the ruling of the Interstate Commerce Commission, attacked in this case. The sequence will be higher rates on local shipments, unless the joint through interstate rate on lumber is restored. Rates cannot be advanced beyond certain limits. The moment they become exorbitant, traffic ceases. Those who live on the line are driven to more favorable localities. Development stops. Bankruptcy follows, and in its wake, a wilderness.

It cannot be expected that a railroad built through a heavily timbered district can secure a heavy tonnage of anything but lumber during the first ten or fifteen years of its existence. The timber must first be cut away, the lands cleared and the country settled before it can derive any considerable revenue from other commodities. As the country develops the ratio of the lumber tonnage decreases, and the ratio of the tonnage of other products increases. This is the history of all new railroads built in the Southwest. By way of comparison, we refer to the tonnage of the Santa Fe Railroad, over 90 per cent of which at the time the evidence in the tap line cases was closed, consisted of logs and lumber. The Santa Fe's Louisiana extension was built through a virgin forest. It was built into the yellow pine forests of Southwestern Louisiana to afford transportation for the logs and lumber along its line.

We are in sympathy with the spirit of the Interstate Commerce Act. We recognize that its purpose is to prevent favoritism or rebating by any means or device whatever, but we cannot agree with the finding of the Commission in its tap line decision, declaring the services performed by the Louisiana & Pacific, Mansfield Railway & Transportation Company, Woodworth & Louisiana Central Railway Company, and the Victoria, Fisher & Western Rail-

way Company those of plant facilities, nor that the incorporation of these companies was a device to secure a rebate.

The Blanket System of Rates as Applied to the Tap Lines.

The entire State of Louisiana, in so far as its interstate lumber traffic is concerned, is under the so-called "blanket" system of rates. The cancellation of the divisions with the tap lines now under consideration, in effect, means that in so far as the lumber traffic moving from points on their various lines is concerned, the blanket rate has been destroyed, the local rate must be paid to the junction point and the blanket rate must be paid from the junction point to destination. Or, the railroad belonging to the lumber company, having undertaken the obligations of a common carrier, must continue to so operate, without receiving the rates it is entitled to receive. It jumps to the eye at once that the lumber mills located upon the main line of a trunk line railroad would, under the decision of the Interstate Commerce Commission, have a decided advantage over the lumber mills located upon the tap lines, when the tap line has become a chartered railroad, operated as such, with all its risks and obligations. The lumber mill on the trunk line will continue to pay the blanket rate, while the lumber mill on the tap line

will pay the blanket rate from the junction point, plus the local rate of the tap line. To put it differently, the lumber mill on the trunk line railroad is advantaged by not having to operate a railroad with all the expenses and obligations incident to a common carrier. This is a discrimination which would soon drive the shipper on the tap line from the timber markets and destroy the "tap line" railroad as a railroad. While this is obviously the purpose of the decision of the Interstate Commerce Commission, it is not to be desired.

The proprietary lumber company, being the largest shipper over the tap line, is as much to be considered as the shipper of the occasional carload from the independent lumber mill located on the tap line. The record shows that there are independent lumber shippers located on all the tap line railroads now before the court, and under the decision of the Interstate Commerce Commission, these shippers are protected on their through shipments to interstate points; but the large investor, the interest which has really built up the section through which the railroad runs and made it possible for the smaller shipper and the independent mill owner to exist, suffers from the discrimination thus created. His enterprise counts for naught.

The Exemption in the Commodities Clause of Section 1 of the Act to Regulate Commerce.

The contention will hardly be made that because the lumber company owns the railroad company it violates the commodities clause of Section 1 of the Act to Regulate Commerce. Congress did not take that view as to lumber. An exemption is made in the commerce clause of timber and the manufactured products thereof. It seems plain that the intention of Congress was that a railroad itself might haul timber or the manufactured products thereof which it owned directly. The records show that this is the practice of the Santa Fe. There is no prohibition in the act to regulate commerce against a lumber company owning stock in a railroad company, and to deprive a railroad company of its right to receive transportation charges in the form of a division out of a through rate because a lumber company owns a majority of its capital stock, is to confiscate its property, nullify its charter and destroy its right as a common carrier of both state and interstate commerce.

The position of the Santa Fe system in these cases is incongruous. It hauled the logs and lumber which it owned, because this is the one commodity it could own and transport under the commodities clause of the act to regulate commerce. It claims

that it is a "country developer," and has genuine railroads that reach into the forests of Louisiana and Texas, which railroads haul the logs it owns to the saw mills it owns, and then hauls the lumber produced by its saw mills to its connections or local destinations. At the same time it denies the right of the tap line railroads, similarly incorporated, and doing precisely the same thing, to reasonable rates for transportation. Is the service of hauling the logs to the mill when performed by a common carrier tap line railroad any the less a transportation service than when performed by a trunk line railroad?

The right to demand reasonable compensation follows the railroad charter and is the only mode by which the object of the charter can be accomplished and the only means by which the company can secure revenues with which to perform the obligations imposed upon it, and save its franchise and property from destruction. Since the right to a reasonable rate for services rendered is a vested right, it cannot be taken away; and an act of the Commission taking it, is a violation of the Constitution.

We do not contend, nor shall we be understood as contending, that a charter which is drawn and put into operation for the furtherance of an illegal purpose should receive the shadow of respect. Such

charters fall of their own iniquity. The very purpose of an illegal charter brings it into disrepute the moment it falls into the light of investigation. But the railroad charters granted to the tap line railroads in these cases by the State of Louisiana do not differ in any respect from the charters of any of the great trunk lines, over whose railroads are carried both intrastate and interstate commerce, and who receive and deliver a part of such commerce from and to the plaintiff railroad companies in these cases. The obligation to serve the public is no less in one than in the other case, and the responsibility to carry the goods intrusted to the care of the Southern Pacific lines and the Texas & Pacific is no greater than is the obligation of the Louisiana & Pacific Railway, the Mansfield Railway & Transportation Company, the Woodworth & Louisiana Central Railroad, or the Victoria, Fisher & Western Railroad.

It is contended by the appellants that the charters of these railroad companies were taken out in an effort to legalize what otherwise would be an illegal transaction. They claim that the paying of a division out of the through rate to the lumber companies that own the controlling stock in the railroad companies is but a subterfuge, a device, a scheme for legalizing the rebates which were formerly paid directly by the railroad company to the lumber com-

pany. To this we reply that if it be true that the railroad companies had paid illegal rebates to the lumber companies before the organization of the railroad companies whose charters are now attacked, it is not a sufficient ground upon which the Court may hold that they are not railroad companies now because some of their stockholders at one time did something which, in the eyes of the law, was improper. There was ample redress against such practices if they were improper. The law does not provide that railroad property shall be confiscated because of the former wrongdoing of some of those who compose the company, if such wrongdoing exists. But there is no power vested in the Interstate Commerce Commission to take away from a common carrier, legally organized under the laws of the State of Louisiana, its right to engage in interstate commerce as to all the freight it handles, because of the fact that it has received a division out of the through rate on shipment of logs and lumber belonging to the lumber company which owns and controls the majority of its stock.

We appreciate that there are nice questions involved in the cases before this court, but we cannot apprehend how any doubt should arise as to the standing of these railroads as common carriers. It

seems beyond comprehension that there should be any doubt whatever as to the right of the Louisiana & Pacific, for example, a common carrier railroad, to receive all the benefits which may justly arise out of the traffic that it handles. Deprived of its interstate tonnage on proprietary lumber, it will soon famish for lack of revenue, because, as is shown by the record, the bulk of the tonnage is lumber owned by its stockholders, who also own some of the lumber companies shipping over its line, and the great volume of the movement is interstate. This is true of all the railroads before this Court, in these cases.

The service of hauling the logs to the mill is properly transportation, and being transportation by a common carrier, it should be paid for on the basis of reasonable compensation.

The railroad itself cannot exist without the authority of the State. A private corporation may build a tramroad on its own land and operate its trains upon such road as long as it sees fit in its own interest. So long as it carries only for itself it is a private carrier, but the moment it opens its lines to the use of the public, holds itself out as a common carrier, and declares its purpose in a charter which it seeks from and is granted by the State, it loses its private character and its use becomes public. Railroad corporations are established to serve great purposes,

and they hold out advantages and benefits to the public, without restrictions, to every one who wishes to comply with their reasonable regulations. Their property is private; their use is public. And it was with these expressed thoughts that the Supreme Court of the United States in the case of **Winona, etc., R. R. Co. vs. Blake**, 94 U. S. 180, 24 L. Ed. 99, held.

“By its charter the Winona and St. P. R. R. Company was incorporated as a common carrier with all the rights and subject to all the regulations that name implies.”

While in no way controlling, the State decisions upon the question of who are common carriers throw some light upon the subject which is the main issue in this case. In the case of **W. C. Agee & Co. vs. Louisville & N. R. R. Co.**, 37 Sou. 680, 152 Ala. 344, the Supreme Court of Alabama held that a railroad which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track, and is, as such, bound to treat the houses located along the track without discrimination, and cannot discontinue its service as to one and continue it as to the others.

The Supreme Court of the State of Louisiana has settled the question of what constitutes a com-

mon carrier in the State in the case of **Amos Kent Lumber & Brick Co. vs. Tax Assessor** (114 La. 862), previously referred to. In this case a railroad owned by a lumber company, operating regular trains for freight and passengers with a fixed schedule of charges, was taxed by the local taxing authorities of the Parish of St. Helena. The owners of the railroad claimed exemption under the provision of the Constitution of the State of Louisiana, exempting from taxation "for a period of ten years from the date of its completion any railroad or part of such railroad as may hereafter be constructed and completed prior to January 1, 1904." The company owning the railroad (not a railroad company), claimed the right of exemption, and the Supreme Court of Louisiana in this case held that the railroad was in fact a railroad and entitled to the exemption. In the opinion, the ownership of a railroad by private corporation is discussed. The Court (p. 863) says:

"The argument of counsel assumes that a limited company or a private individual cannot own and operate a railroad, but that is a mistake. 'Railroads may be owned by private individuals.' "

Is it not stretching the law beyond reason for the Interstate Commerce Commission to say that one railroad company organized under the laws of a sov-

foreign State can engage in interstate commerce, and another railroad company organized under the same laws, acting under a similar charter and performing similar functions, with the same rights and obligations, may not engage in interstate commerce as to some of its traffic, but places no restriction upon it as to the remainder of its traffic?

In the case of **Chicago, Burlington & Quincy R. R. Co. vs. Cutts**, 94 U. S. 155, 24 L. Ed. 94, the United State Supreme Court says:

“Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers in order that they may better serve the public in that capacity.” * * *

Speaking of the railroad company in that case, the Supreme Court says:

“This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage.”

The Discrimination Made by the Interstate Commerce Commisison Between “Transportation” as to Different Shippers and Different Commodities.

The Interstate Commerce Commission’s finding as to the Louisiana Pacific Railway Company and the other lines which have been classed as tap lines is:

"The service performed for the respective proprietary lumber companies in moving logs from their respective forests to their respective mills, and in moving the product from the mills to the trunk lines is not a service of transportation by a common carrier railroad, and any allowance of division of the rate on account thereof is unlawful."

A finding that this chartered railroad corporation is not a common carrier in full, but only a common carrier in part; a common carrier as to the flour, corn and general merchandise which it hauls, but not a common carrier as to the logs and lumber which it hauls for those who own its stock; a common carrier as to certain shippers, but not a common carrier as to all shippers; a common carrier as to some of the freight hauled for those who control its stock, but not a common carrier as to all of the freight of those who control or own the railroad. This is a new distinction in law, not supported by any decision from any court in this country. **Tap Line Case, 23 I. C. C. Rep. 277.**

The question to be determined here is **whether or not the corporation performing the service and making the charge is entitled to reasonable compensation as a common carrier.** And the finding of the Interstate Commerce Commission amounts to a direct decision that these railroads are not common carriers

as to the service which they perform in hauling the logs and lumber of their proprietors.

The Public Necessity of the Tap Line Railroads.

The State of Louisiana, through its Railroad Commission, has offered evidence in this record to show the public necessity for these railroads to be operated in all respects as common carriers. Attention has been called to the fact that their greatest revenue comes from the logs and lumber which they haul, and during their early history it follows that it is upon the revenue derived from such transportation that their existence depends.

It is common knowledge that the railroad development in Louisiana has followed the development of the lumber industry, and at the time the investigation into the tap line cases was being made by the Interstate Commerce Commission, every railroad in Louisiana, with one or two exceptions, was hauling a greater percentage of lumber than of any other single commodity. It should not be surprising then to find that the shortest and youngest railroads in the State of Louisiana seeking their tonnage from the forests. The sawmill located in the midst of the forest needed transportation for its lumber, just as the sawmill located on the main line of the trunk line railroad needed transportation for its logs. This

transportation was afforded by the short line railroads built by the lumber companies themselves. It would seem immaterial to discuss this phase of the question, were it not for the fact that the report of the Interstate Commerce Commission on the Tap Line Case lays some stress upon the volume of the lumber traffic as compared with the other traffic hauled over the appellee railroads now before this Court, and also refers to the scarcity of the outside public served.

The contention which we here make was, it seems to us, in the mind of the Interstate Commerce Commission when the order in the Tap Line Case was adopted, which idea we gather from the following language:

“The inquiry with this Commission, therefore, is not whether a railroad company has been incorporated, but whether the company or the person claiming to be a common carrier by rail is a common carrier in fact. If there is a holding out as a common carrier for hire, and if there is an ostensible and actual movement of traffic for the public for hire, generally speaking, the status of a common carrier may be said to exist, whether the holding out was by a company or by an individual.” * * *

“It follows from that view of the matter that the common ownership of an industry and of a railroad that is held out as a com-

mon carrier and has some traffic for the public fore hire, is not in itself sufficient to divest the railroad of its status as a common carrier." (The Tap Line Case, 23 I. C. C. Rep.)

It is difficult to reconcile the conclusion of the Commission with the legal definitions of common carriers, which form part of every text book on the subject, as taken from the decisions of the Courts.

The duty of the "tap lines" before this Court to serve the public is not merely as an accommodation. It is compelled by a charter, the obligations of which cannot be escaped.

In the case **New York Central Railroad Co. vs. Lockwood** (17 Wall, 357-384; L. Ed., 627-642), the Supreme Court of the United States used the following language:

"It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law, excepts, also, losses by means of any superior force, and any inevitable accident. Yet the

employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, where the latter assumes the risk of inevitable accident in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier received from the same person twenty other parcels, respecting which no such contract is made. **Is the company a public carrier as to the twenty parcels and a private carrier as to the one?"**

And answering its own query, the Court replies:

"But when a carrier has a regularly established business for carrying all or certain articles, and specially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of articles is embraced within the scope of its chartered powers, **it is a common carrier**, and a special con-

tract about its responsibility does not divest it of the character."

In a case from Maine, the Court expounds principles that have long been recognized as controlling:

"But the mere fact that the primary purpose of such a branch is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is **determined by the extent of the right** to its use, and not by the extent to which that right is or may be exercised. If it is a public way the fact is not material that but few persons will enjoy it. When such a branch track is first constructed, and the right of way necessary therefor is taken it may in fact be used only for the business of the plant for which it is constructed, because at that time no other business enterprises may exist in that vicinity to furnish freight for transportation; but in the future, other enterprises may spring up, either upon the line or upon the extension thereof, so that a branch track, which in the first instance is primarily constructed for the accommodation of one may become of equal accommodation, benefit and use to others." **(Ulmer vs. Lime Rock Ry. Co., 98 Maine, 579; 57 Atl., 1001.)**

In this case the leading authorities of the country are reviewed, and general principles are laid upon the foundation of the unbroken line of decisions of the appellate courts.

"The tests decisive of this question," says the Court in the Maine case just cited, "as to whether a branch road of this character is to be constructed and operated for public or private purposes deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public to be used upon equal terms, by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they may be served without discrimination, not merely by permission, but as of right; and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one, and the Legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track, and if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the Legislature may be exercised in that particular case."

In the following cases the same doctrine has been expounded:

De Camp vs. Hibernia R. Co., 47 N. J. Law. 43.

National Dock R. R. Co. vs. Central R. R. Co. 32 N. J. Eq. 755.

C., B. & N. R. Co. vs. Porter, 43 Minn. 527; 46 N. W. 75.

Phillips vs. Watson, 63 Iowa 28, 18 N. W. 659.

Dock & Canal Co. vs. Garrity, 115 Ill. 155, 3 N. E. 448.

Gaylord vs. Sanitary Dist. of Chic., 204 Ill. 576, 68 N. E. 522.

Butte, Anaconda, etc., Ry. Co. vs. Montana, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508.

In **Norway Plains Company vs. The Railroad** (1 Gray, 263; 61 Am. Dec., 423), it was held:

“That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them and carry goods for hire, are circumstances which bring them within all the rules of common law and make them eminently common carriers. Their iron roads, though built in the first instance by individual capital, are yet regarded as public roads, required by common carrier convenience and necessity, and their allowance by public authority can only be justified on that ground.” * * *

In the case of **Butte, Anaconda & Pacific Railway vs Montana Union Railway** (16 Mont., 504; 50 Am. St. Rep., 508; 31 L. R. A., 298), where a “tap line” railroad was first reviewed by a court, the following principles were discussed and applied:

“Frequently railroads are extended by spurs or lateral connections of main lines, or by independent lines, into mining camps

where but a single line is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and, when constructed, it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or, perhaps, the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the lateral railroad built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but, by reason of the impracticability of expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any expectation on their part of aiding any project other than their own, a rail-

road is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the State, can discriminate against him by saying, 'We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to bring your machinery and supplies into these hills, and you cannot compel us to act otherwise?' "

In this case will be found a review of many decisions supporting the same principles.

In the case of **McCloud River Lumber Co. vs. Southern Pacific Co. et al.** (24 I. C. C. Rep., 89), the Interstate Commerce Commission held that the McCloud River Railroad, although identical in ownership with the plaintiff, was entitled to through routes and joint rates in connection with the Southern Pacific lines and connections. The McCloud River Railroad had, according to the decision, 46 miles of main line and 51 miles of logging branches and spurs. It was organized January 21, 1897, under the laws of California. It files tariffs and reports and keeps its accounts in accordance with the regulations of the Commission. It operates a number of passenger and freight trains daily. Owns quite a lot of equipment. Ninety-four per cent of the total freight tonnage of the road was products of the for-

est. The Southern Pacific refused joint rates and divisions to the McCloud River Railway upon the theory that the latter railroad was but a plant facility, a branch built for the purpose of conveying lumber to the main line by means of the cheapest method possible. It was treated by the Southern Pacific Company as analogous to an ox team, a flume, or other means of conveyance, the expense of which should be borne by the lumber company and not by the Southern Pacific Company. No attempt was made by the Commission to prescribe the divisions of the through rate; but through rates were ordered, the McCloud River Railway's existence as a "plant facility" ended, and its full-fledged life as a common carrier railroad initiated. Does not the life of a common carrier begin with its charter, and is it not entitled to be so recognized from the moment it engages in the business of serving the public?

The Courts have always taken judicial notice of the fact that a railroad company is a common carrier where a statute declares it to be such, and declaration and proof of such a fact is unnecessary. **Caldwell vs. Richmond, etc., R. Co.** (89 Ga., 550); **Denver, etc., R. Co. vs. Cahill** (8 Colo. App., 158).

It is true, it is impossible for a common carrier of freight or passengers, or both, to carry on its

business without a railroad; but it is immaterial whether it owns the railroad over which it operates, leases it, or builds and sells it, retaining the right to operate its trains over it. It is transportation which gives to the carrier its life, and, so long as it holds itself out to carry persons and their goods and furnishes the means for doing so, by operating trains, it is performing the functions of a common carrier, is liable as such and must serve all upon the same terms for similar service.

In the **Lake Superior & Mississippi Railroad Company vs. United States** (93 U. S., 442, 23 L. Ed., 965), Mr. Justice Bradley being the organ of the Court, said:

“But the ascertained impracticability of the general and indiscriminate public use of these great thoroughfares (railroads) does not preclude their use by transportation companies having no interest in the roads themselves. Such companies, in fact, are actually engaged in conducting vast carrying business on the principal lines of railroads throughout the country.”

An early decision of this Court embodies the fundamental principle of these cases. The Court then says:

“But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a

corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character." **N. Y. C. R. R. Co. vs. Lockwood**, 17 Wall, 357 (377); 31 L. Ed., 627 (639).

In a comparatively recent decision, this Court has discussed the question as to what are interstate carriers. In **United States vs. Union Stock Yard & Transit Company of Chicago** (decided December 9, 1912), 226 U. S., 286, it is held that a corporation organized for the purpose of maintaining a stock yard, with the usual facilities of such yards as to loading and unloading and caring for freight, which lawfully owns and operates a railroad system for the transportation of cars to and from trunk lines, in the course of their transportation from beyond the state and to points outside of the state, is an interstate railway carrier within the meaning of the interstate commerce act of February 4, 1887, and as such is obliged to file its tariffs with the Interstate Commerce Commission, as required by Sec. 6 of that act, the Supreme Court says (speaking of the Union Stock Yard & Transit Company and the Chicago Junction Railway Company):

“They are common carriers because they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and because they are so treated by the great railroad systems which use them.”

There can be no doubt that the tap line railroads involved in these cases are common carriers.

Then, is the service they perform in hauling the logs to the mill “transportation service,” or “plant facility?”

If they are common carriers, what particular part of the service they perform is the shipper's duty?

It would seem beyond dispute that when a common carrier moves a shipment of freight over its own rails under a shipper's order, it is entitled to compensation.

Is it in any sense the duty of the shipper to haul its logs over the railroad of a common carrier? May the common carrier perform such a service without compensation for one shipper and charge another? If it is “transportation” for the tap line railroads to haul logs over their lines for those who do not own their stock, is it any the less “transportation” when a similar service is performed for those who do own stock?

These questions have been unsolved by the decision of the Commerce Court in favor of the conten-

tions of the tap lines, which we have consistently supported from the time the trunk line railroads began cancelling the through rates and divisions with them.

These tap line railroads are "common carriers engaged in the transportation of passengers or property."

The lumber "tap lines" of the South and Southwest must not be confused with the inter-plant and intra-plant facilities of the industries of the East. There is a vast difference between the lumber road and the railroad built within the gates, so to speak, of the iron and steel mills, or the breweries. In the lumber mills there are rails used as a part of the plant. They are the logging spurs upon which the skidders load the cars with logs. These spurs are temporary, leading out from the main line of the tap line railroad to the point where the logs are loaded. There are the tracks that connect the warehouses in the yards of the mill. These are not included in the tap line haul. They represent the true plant facility, and are distinct and easily distinguishable from the tap line railroad.

The public importance of these railroads has been dwelt upon in the decisions of the Interstate Commerce Commission and was referred to in the opinion of the Commerce Court.

If they were created for the great wrongs indicated by the briefs of the appellants, they would be a disgrace and a shame to the nation and the state. If the receiving of a division out of a published through rate by these tap line railroads is the crime charged by the Santa Fe Railway Company, the only voice complaining here of the divisions, the government would long ago have instituted proceedings against the giver and the recipient of these "rebates."

The Atchison, Topeka and Santa Fe Railroad Company, in its brief, makes the bold and erroneous assertion that the divisions received by the tap lines are **secret rebates**.

The Act to regulate commerce provides that all agreements and contracts between carriers shall be filed with the Commission, and the tariff showing the through rates and the agreement under which the rates were divided were promptly filed with the Commission, as they were made or issued. The tap lines complied with the law in the same manner as all other carriers. They did not conceal anything or seek in any way to evade the requirements of the statute. Quite the contrary, they sought in every way to comply with the requirements of the Act to regulate commerce, and did so fully and completely.

For three years this case has run the gauntlet of the Commission and the Courts, and in that time great changes have been wrought in the conditions along some of the tap lines.

The government has, we understand, called the Courts' attention to the action of the Interstate Commerce Commission's rehearing in the tap line case, for argument on the fundamental principles involved, which was heard at Washington on February 4th and 5th, 1914. This action has a significance, in that it seems to indicate that the Commission either admits that it may have erred in its former decision in the tap lines case, or that it is in doubt as to the proper solution of the questions involved.

There seems no parallel case where such great enterprises have been throttled by administrative action, when nothing but benefit was resulting from the continuance of the legitimate practices attacked—a practical benefit to a great, new country, awakening into a land of homes and thrifty people. An awakening that has followed, and is following, the enterprise and investments of the lumber men in substantial railroads that, except for their industry, would not have been built for years to come, if, in many cases, at all.

CONCLUSION.

We shall take no occasion to discuss or review the late jurisprudence of this Court upon the fundamental questions involved. The briefs of the carriers and the government will fully present these phases of the questions. Our purpose is to lay before the Court the public's side of these important cases.

The State of Louisiana depends upon its railroads for its future prosperity. With only a little more than five thousand miles of operated railroad (5,257 miles single track operated on June 30, 1912), it can not afford to lose any of the lines which form a part of its railroad system. It has many practical examples of the growth of some of its most important railroads from what were at one time insignificant "tap lines." The State is advertising its resources to the world, and using every means in its power to induce immigration to her fertile soils. Along the tap lines, slowly but surely, there is a growth and extension of outside interests—a general settlement of the lands along the tap lines. These facts explain, to some extent, the interest of the State of Louisiana in these cases. But the decisions of the courts and the laws of the country furnish unanswerable reasons why the shippers of Louisiana, represented by their Railroad

Commission, are demanding that the ancient maxim of the law, that **"one who undertakes for hire to transport the goods of such as choose to employ him, from place to place,"** is a common carrier, be applied in these cases, and that, being common carriers, they perform a service of "transportation" when they haul the logs and lumber of those who own their capital stock, for which they are entitled to reasonable compensation.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

**THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY CO., et al.,**

Appellants,

vs.

**LOUISIANA & PACIFIC RAILWAY COM-
PANY et al.,**

Appellees.

No. 830.

**THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY CO., et al.,**

Appellants,

vs.

**THE WOODWORTH & LOUISIANA CEN-
TRAL RAILWAY COMPANY et al.,**

Appellees.

No. 832.

**THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY et al.,**

Appellants,

vs.

**MANSFIELD RAILWAY & TRANSPORTA-
TION COMPANY et al.,**

Appellees.

No. 834.

**THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY CO., et al.,**

Appellants,

vs.

**VICTORIA, FISHER & WESTERN RAIL-
ROAD CO., et al.,**

Appellees.

No. 836.

BRIEF FOR APPELLANTS.

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CHICAGO, March 7, 1914.

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Errors

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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al., <i>Appellants,</i> <i>vs.</i>	}	No. 830.
LOUISIANA & PACIFIC RAILWAY COM- PANY et al., <i>Appellees.</i>		
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al., <i>Appellants,</i> <i>vs.</i>	}	No. 832.
THE WOODWORTH & LOUISIANA CEN- TRAL RAILWAY COMPANY et al., <i>Appellees.</i>		
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., <i>Appellants,</i> <i>vs.</i>	}	No. 834.
MANSFIELD RAILWAY & TRANSPORTA- TION COMPANY et al., <i>Appellees.</i>		
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., et al., <i>Appellants,</i> <i>vs.</i>	}	No. 836.
VICTORIA, FISHER & WESTERN RAIL- ROAD CO., et al., <i>Appellees.</i>		

STATEMENT OF THE CASE.

These are appeals taken by The Atchison, Topeka and Santa Fe Railway Company and the Gulf, Colorado and Santa Fe Railway Company from a decree of the United

States Commerce Court setting aside an order of the Interstate Commerce Commission in what are known as the tap line cases. The questions involved in these cases are identical with the questions involved in Cases Nos. 829, 831, 833 and 835, which are appeals taken by the United States and the Interstate Commerce Commission from the decree of the United States Commerce Court in the same cases. Because the United States and the Interstate Commerce Commission will no doubt deal with the particular facts in each case, this brief will be confined to a statement of the general situation revealed by the record and a discussion of those fundamental principles of law applicable thereto.

These appellants are trunk line railroads which penetrate the great lumber district here involved, and reach, in competition with other trunk lines, various important lumber markets. The lawfully published tariff rates of these appellants are the same as the lawfully published tariff rates of the competing trunk lines. Appellants compel and in the past have compelled shippers of lumber located on their lines to pay the lawfully published tariff rates. The other competing trunk line railroads, however, have been accustomed to making to favored shippers a rebate from the tariff rate ranging from 1c to 7c per 100 pounds, by the devices hereafter referred to, so that as a result of such rebate the large and favored shippers located upon the competing railroads were enabled to market their lumber at a cost much less than shippers located upon the lines of these appellants, and these appellants were seriously hampered in their efforts to get or move traffic by reason of the fact that they obeyed the law and collected the tariff rates, while their competitors disobeyed the law and made rebates and concessions from the tariff rates.

This most grievous and menacing violation of the Act to Regulate Commerce had existed for a long period of time prior to 1904. In 1904 the Interstate Commerce Commission entered into an investigation of the matter and in the case of *The Central Yellow Pine Association v. The Vicksburg, Shreveport & Pacific Railroad Company et al.*, 10 I. C. C. R., 193, decided that the allowance made to the favored shippers of lumber was a rebate, and condemned the practice.

In that case the history of the practice of making allowances to shippers as well as the results flowing from it were considered at some length. The general principles antagonistic to such rebate were announced in that case, and it was distinctly pointed out there that although in some cases the tap line was a mere department of the mill and in others was operated by a separate co-partnership composed of the same individuals that owned the mill, and in still others by a chartered corporation, the stock of which was owned by the mill company or its operators, in practically all cases the allowances in the nature of a division of a joint rate received from the regular carriers finally, if not directly, inured to the benefit of the mill company; and the Commission said then that the substance and nature of the transaction could not be altered by merely changing the name of the party to whom payment was made and that such a course would be nothing but a transparent device for securing an illegal concession. But because in that case the Commission decided that "under the Act to Regulate Commerce a common carrier subject to its provisions can allow a division of rates only to another common carrier" (Syllabus 5), that guarded expression was seized upon by ingenious minds as a justification for continuing to accept the rebate provided that the industry tracks were incor-

porated as common carriers. As a result, therefore, those industry tracks connecting the various mills and timber with one another, and which tracks were used by the mills for their own convenience in manufacturing and carrying on their business, and as a necessary part of the manufacture of lumber, were incorporated and were utilized by the mill owners to secure from the trunk line railroad a division of the through rate. Therefore, from 1904 the industry tracks and logging trams in question were incorporated as common carriers and the same rebate which had been condemned in the Yellow Pine Case was continued.

After the tap line was incorporated there was no change either in its physical characteristics or in the extent or nature of the service that it performed for the lumber company by which it was owned. The tracks and equipment of the lumber company were simply turned over to an incorporated railroad company and the work of the controlling industry went on precisely as it had when the tracks and equipment were operated directly by it. By the device of incorporating, therefore, this rebate was skillfully covered and for a long time successfully concealed.

It had been the custom to pay the rebate from the tariff rate direct to the favored shipper, but with the incorporation of the industry tracks and as an additional step in the consummation of that device, the tap line was given a division of a joint through rate; that is to say, the same allowance that had formerly been openly paid to the shipper was now paid to the incorporated line under the guise of a division of the through rate. This division, of course, was a matter of secret agreement between the parties, as the law does not require the publication of divisions. As the agreement was secret, the different

shippers or tap lines never knew how much their competing neighbors received, and one trunk line carrier not knowing the division offered by its competitor was bidding in the dark for the tonnage of the big shipper. But nevertheless it resulted that the large and favored shippers received from some of the trunk lines for a haul by the shippers' tap lines which varied from 25 feet to a few miles (all of which haul was purely incidental to the manufacturing business of such shippers, and in no sense an incident of transportation by a common carrier) nearly as much revenue as the trunk line carrier received for the transportation service of several hundred miles. Indeed, as was said by the Commission in its report in the present tap line case, 23 L. C. C. R., 283:

"In the competition of carriers for the traffic allowances as high as 7 cents per 100 pounds have been paid out of a 14-cent rate, where the haul of the tap line was a matter of feet and yards while the haul of the carrier itself approximated 400 miles."

The function performed by the large and favored shipper as a justification for obtaining such allowance was precisely the same as that performed by the unfavored shippers who received no allowance, and was the same as that performed by all shippers adjacent to the lines of these appellants. The evil of such a situation may be thus concretely stated:

Under a tariff rate of 14c to a given point shippers on the lines of these appellants, as well as the unfavored shippers on the competing trunk lines, were obliged to pay the full tariff rate, while the favored shipper on the competing trunk line would have rebated to him 7c, so that such favored shipper would get his lumber to market at a net rate of 7c per 100 pounds, as against 14c paid by his competitors.

Attention is called to the findings of fact made by

the Interstate Commerce Commission with reference to the subject under discussion for the purpose of showing:

A. That the method of manufacturing and marketing lumber is the same throughout the territory involved and that under this method it is recognized that the activity performed by the tap line is incidental to the manufacturing business of such lumber and in no sense an incident of transportation by a common carrier.

B. That on this general understanding lumber interests are manufacturing their lumber and competing with one another in the lumber markets, so that when the trunk line makes a rebate to the favored shipper it unduly discriminates in his favor and against all his competitors not so favored.

C. That the same is true with reference to the haul of logs from the forest to the mill.

D. That no real change in the situation was effected by the incorporation of the tap line.

E. That the result of this device of rebating was gross discrimination.

A.

That the method of manufacturing and marketing lumber is the same throughout the territory involved and that under this method it is recognized that the activity performed by the tap line is incidental to the manufacturing business of such lumber and in no sense an incident of transportation by a common carrier.

In the case of *Central Yellow Pine Association v. U. S. & P. R. R. Co.*, 10 I. C. C. R., 193, 195-6 (decided March 19, 1904), the Commission said:

"The method of manufacturing and marketing this lumber is essentially identical in all parts of the south. Mills are at first constructed upon the lines of railway traversing that territory and the logs are hauled into these mills from the forest. As the timber is cut off, however, and the haul becomes

longer, it is necessary to provide some other means for bringing the logs to the mill. If the mill happens to be situated upon a stream they are sometimes floated down, but ordinarily a railroad is built into the timber and the logs are transported by this means. These logging roads are usually of the standard gauge, although not invariably, and are constructed and operated as are the main line railroads of this country, the power being furnished by locomotives and the logs hauled upon flat cars. In process of time the logging road increases in length until it frequently reaches 50 or 60 miles. The cost of constructing these roads is from \$6,000 to \$8,000 per mile. As already indicated, the use of this appliance for bringing logs to the mill is almost universal with large plants. There are few mill operations of any extent upon the east or the west of the Mississippi River which do not embrace as a part of the necessary outfit a logging road of this character."

So, also, the Commission said in its report in the case in contest, I. & S. Docket No. 11, 23 I. C. C. R., 277, 280:

"In the operations of manufacture and production it was first the practice to use horses and wagons for handling materials in and about the industrial plant, and in the same way to haul the raw material from the tracks of the public carrier to the plant, and to haul the manufactured product from the plant to the carrier's receiving station. Later pushcarts and handcarts, sometimes moving on rails, cranes, conveyers and other appliances were brought into use. These facilities are still to be found in many of the smaller industries. But with the combinations of capital and the concentration of manufacturing operations into large plants, railroad tracks, cars and locomotives have become necessary to avoid delay and expense in handling the raw material into and in and about the plant, and in order to deliver the manufactured products as cheaply as possible from the plant to the carriers that move them to the markets. It cannot be doubted that large economies in the cost of manufacture and production have been effected in that way. When the service is performed on rails by a bureau of the industry and with loco-

motives that it owns and with crews that it employs, this change in method was manifestly not a change in the thing done but simply a change in the facility used for doing the same thing. Whether the service, so far as the controlling industry is concerned, takes on another aspect when the rails and locomotives have been set over to an incorporated railroad company owned by or in the interest of the industry, and ceases to be a part of the industrial operation as was the service performed by the horses and carts and other appliances formerly used by industrial companies and still used by the smaller concerns, is a question that manifestly must depend upon the facts in each case."

B.

That on this general understanding lumber interests are manufacturing their lumber and competing with one another in the lumber markets, so that when the trunk line makes a rebate to the favored shipper it unjustly discriminates in his favor and against all his competitors not so favored.

On page 297 of its report in the case in contest the Commission makes the following statement:

"With a very few exceptions not one of the tap lines before us would continue to operate if the mill by which, or in the interest of which it is owned should cease to run; they were all built to serve the proprietary mill and the incorporation was an afterthought developed out of the keen competition of the trunk lines for the traffic. Their real relation to the industry is primarily nothing but that of a plant facility, and such outside traffic as they are able to pick up is purely incidental. With one or two possible exceptions not one of them would have been built or would now be operated for the outside traffic only; not one of them would cease its operations if deprived of the outside traffic altogether, for it is a part, and a necessary part, of the lumber investment; and with two or three exceptions not one would continue in operation after the mill to which it belongs

had been shut down. In other words, with very few exceptions they are purely plant facilities.

As we have seen, this is the theory upon which the lumber interests in general are today manufacturing their lumber and competing with one another in the general lumber markets. It is the theory that prevails in the yellow pine district east of the Mississippi River, and is the theory upon which a majority of the lumbering operations west of the river are conducted. They are hauling their logs to their mills at their own cost and with facilities that they regard as a mere adjunct to and a part of the machinery of manufacture. It is clear, then, that appliances that are generally regarded by the lumber interests themselves not only as mere plant facilities, but as necessary facilities in the successful conduct of their investments, cannot reasonably be held to become the transportation facilities of a common carrier merely because a lumber company has incorporated a small railroad company and turned the facilities over to it. There must be something more substantial than a mere manipulation of the situation in order to change the real relation of these facilities to the industry."

C.

That the same is true with reference to the haul of logs from the forest to the mill.

Because some of the tap lines attempted to justify the allowance or rebate from the tariff rate on the ground that in some cases the haul of logs from the forest to the mill was substantial and was an incident of transportation of a common carrier rather than an incident of the business of the shipper in manufacturing lumber, the Commission considered the matter, and in its report in this case on page 296 it said:

"It may be well at this point to make a brief reference to the haul of logs to the mill. Lumbering is one of the primary occupations and lumber products

are as necessary and even more widely used than are the products of coal mines. Lumbering processes are more or less familiar to everyone. The forest must be made into logs and the logs must be drawn to the mill and there converted into lumber. Whether this is done with ox teams or horses, on wagons or sleds, or the logs are floated down a stream to the mill or are carried there in flumes or otherwise, the service that the lumberman thus performs for himself is industrial and not a service of transportation. When the adjacent timber has been manufactured there is an economy in reaching the more distant timber by the use of rails and locomotives, and these appliances are often used in the larger operations. But the character of the thing done is not affected by the new means employed to do it. Nor do the new appliances bear a different relation to the industry. A number of witnesses admit, and the whole record shows, that a large lumbering operation in this territory cannot be conducted economically without a tap line. Tracks and locomotives are as necessary to successful results from the investment as the mill itself. One or two of the companies avail themselves of streams to float the logs to the mill, but all the other lumbering operations of any magnitude in the southwest have tap lines. East of the river, as we have seen, and in the majority of instances west of the river, they are regarded, like the mill itself, as a mere plant facility. Each of the tap lines west of the river that now claims to be a common carrier was originally operated directly by the proprietary lumber company and as a part of it. The only exception to that statement is that in the case of some of the more recent investments the tap line was incorporated and the track laid while the mill was being constructed. With one exception and regardless of the date of their construction, every tap line now before us is owned by or in the interest of a lumber company, and with one exception was built by the same people that own the forest and the mill, and with no other real object than to serve the mill as a necessary plant facility. That is their present primary purpose and use and no pretense to the contrary is made."

D.

That no real change in the situation was effected by the incorporation of the tap line.

Dealing with this proposition the Commission in its report in this case said on pages 285 *et seq.*:

"Some new mills have been erected within the last four or five years. In most of these cases the tap lines were constructed in the name of an incorporated railroad company, owned, however, either by or in the interest of the lumber company. But in the great majority of the cases on the record the present incorporated railroad company operates tracks that were originally constructed and operated directly by the lumber company as a facility in its manufacture of lumber. Later the title to them was turned over to the newly incorporated railroad company in exchange for its stock. In all these cases the railroad company is directly owned by the lumber company or in its interest. In most instances the tap line was incorporated for no other purpose than to give the lumber company the color of a legal right to receive allowances. Witness after witness, as heretofore stated, broadly and definitely admitted at the hearing that the sole object in incorporating his tap line was to obtain and legalize the allowances. For the Bernice & Northwestern a witness said:

'Well, we really chartered to get the divisions; we had to charter before we could get them. We chartered in order to get the divisions.'

This statement was not made under the stress of cross-examination but in reply to an inquiry as to why his road had been incorporated. It is illustrative of many similar statements made on behalf of other tap lines; they were incorporated, in other words, not to serve the public, but primarily to get an allowance. When the Rock Island lines were pushed into this territory already served by other lines it entered upon an active contest to share in the lumber traffic by offering higher allowances or divisions than the other lines were paying. A standard form of contract was prepared to which both

the lumber company and its tap line were usually parties. One of its requirements was that the lumber company must route not less than 50 per cent of its traffic over the Rock Island lines. Another clause, inserted as a protection against possible future troubles and obligations, provides that in case this Commission or a state commission or any court should declare the contract unlawful or the allowances excessive, the former should at once become void, and in either event no claim for damages should result against the Rock Island. It appeared at the hearing that in many cases the lumber companies had incorporated their tap lines on the advice of the Rock Island or other public carriers serving this territory. For the Sabine & Northern Railroad, Mr. Walden said:

'We incorporated because the traffic department of the Kansas City Southern advised me that it was the opinion of their legal department that they could not pay divisions * * * unless the roads were legally incorporated as common carriers, and in order to get these divisions we incorporated.'

The record is filled with similar admissions by other witnesses representing other tap lines. Counsel for one trunk line in order, as he explained, to get the fact of record, said that his legal department some years ago advised the traffic department that it would be illegal to pay an allowance or a division of any kind to an unincorporated tap line, but that it would be legal to pay a division to an incorporated tap line. Subsequently, his traffic department advised the lumber interests that had been receiving allowances that they would no longer be paid unless their lines were incorporated, and new lines were advised that they had to be incorporated.

But, generally speaking, there was no change after the tap line was incorporated, either in its physical characteristics or in the extent or nature of the service that it performed for the lumber company by which it was owned. The tracks and equipment of the lumber company were simply turned over to an incorporated railroad company and the work of the controlling industry went on precisely as it had when the tracks and equipment were operated directly by

it. The only dissimilarity that exists between tap lines that receive allowances and those that do not is that the former are incorporated while the latter are not."

E.

That the result of this system of rebating was gross discrimination. On pages 283, 284 and 285 of its report the Commission said:

"That discriminations grow out of these contributions by the public carriers to certain of the lumber interests in Arkansas, Missouri, Texas, and Louisiana is apparent upon the face of the record. The allowances paid range from a minimum of three-quarters of a cent to 6 cents per 100 pounds. In the competition of carriers for the traffic allowances as high as 7 cents per 100 pounds have been paid out of a 14-cent rate, where the haul of the tap line was a matter of feet and yards, while the haul of the carrier itself approximated 400 miles. The amount of the allowance seems not to be governed definitely by the extent or character of the service said to be performed by the tap line, but to result to some extent from the bargain made between the carrier and the lumber company. In one case a tap line, operating 6 miles of main line, receives allowances of 3 and 4 cents per 100 pounds, while a few miles away another tap line, operating 12 miles, receives but 1 to 2½ cents per 100 pounds, depending upon destination; in each case the public carrier performs all the service between the mill and its own tracks. It did not appear that the controlling lumber companies, the real beneficiaries of the allowance, knew of the discrimination between them until the facts developed on the hearing. Other instances appear of record where incorporated tap lines are receiving allowances that are less or greater than the allowances paid to other incorporated tap lines performing a service that is substantially similar in extent and character and under like conditions. A number of witnesses for tap lines expressed surprise at the hearing upon learning of the larger allowances paid

to other tap lines. The three principal trunk lines whose tracks extend through the territory in question are the Kansas City Southern, the Iron Mountain, and the Rock Island. As illustrating the extent of the discrimination arising out of the payment of allowances to some tap lines and the failure to make allowances to others, it is well here to state that of 27 tap-line connections of the Kansas City Southern it makes allowances to 15, while 12 receive no allowances. The Iron Mountain has junctions with 90 tap lines, to 63 of which allowances are made; the other 27 have no allowances. The Rock Island is reached by 43 tap lines. Of this number it makes allowances to 33, leaving 10 without allowances. This was the condition existing at the time of the hearing.

This difference in the treatment by carriers of lumber companies owning incorporated tap lines is one form of discrimination growing out of tap-line allowances. But there are also other forms. There is the discrimination involved in the payment of allowances to one lumber company through its incorporated tap line, while the same public carried in the same territory refuses to make any allowance to another lumber company using a tap line that has not been incorporated, but where all the other conditions, as well as the extent of the service, the mileage, motive power, cost of operation, etc., are substantially similar. An instance of this kind is before us upon formal complaint in Docket No. 3878. This proceeding was brought by the Davis Brothers Lumber Company against the Chicago, Rock Island & Pacific Railway Company and other carriers. The complainant company was included in our general investigation and the conditions under which it conducts its lumbering operations are shown of record and are explained upon its complaint. It appears that its plant and yearly output are much more extensive than those of many other lumber companies that are receiving allowances. It has 16 miles of tap line and 5 miles of logging spurs. It operates 4 locomotives and uses 40 logging cars. It has a small amount of traffic for outsiders, a claim that cannot be advanced by many of the incorporated tap lines that

are receiving allowances. In its complaint it points out that all the lumber companies in this territory have long used logging roads to haul logs from their adjacent forests to their mills, and that these facilities have, until recent years, been regarded as mere adjuncts to their plants; that the Rock Island, on the pretense that tap lines become common carriers when incorporated, is making allowances to the competitors of the complainant, ranging from 2 to 3 cents per 100 pounds and even higher, while refusing such aid to the complainant which uses and always has used a logging road of the same kind, for the same purpose, and which it has operated at the same proportionate expense. A striking allegation in the complaint is that the Rock Island has offered to pay the complainant similar allowances if it would go through the form of incorporating its logging road as a common carrier, a device which the complainant regards as a mere evasion of the act, and to which it therefore has declined to resort. It is a device, however, which the record shows has been adopted by many lumber companies in this territory at the express suggestion of trunk lines which desired their traffic and advised the incorporation of their tap lines as a basis for legalizing allowances.

The tap lines that are not incorporated are operated in precisely the same way and for precisely the same purposes, so far as the proprietary lumber companies are concerned, as are the incorporated tap lines. Nevertheless the lumber companies that have not incorporated their tap lines must not only bear the entire burden of the cost of their operation but must share with the general shipping public the burden cast upon the rates by the large amounts paid by the trunk lines to lumber companies having incorporated tap lines. The aggregate figures are not available in this proceeding, but from a careful check of the information found on the record it has been estimated that the allowances paid through their incorporated tap lines to these lumber companies in Louisiana, Arkansas and Texas amount to not less than a million and a half dollars annually. Were the facts accurately known it is said that a complete check would disclose an aggregate of from two million to

three million dollars annually. Indeed, the assistant attorney general of Louisiana, using figures prepared by the railroad commission of that state and relating to that state only, said on the argument:

'The tap lines incorporated and operated as common carriers haul an annual tonnage of 4,061,876 tons of lumber. Assuming the average allowance paid the tap lines in Louisiana as 3 cents per 100 pounds, it may safely be estimated that the tap lines received \$2,437,125 as divisions from their interstate freight rates with trunk lines.' "

In concluding its general observations in the tap line cases the Commission said on pages 298-9 of its report:

"To these general observations it may fairly be assumed that no valid objection can be made, for what is a plant facility cannot also be a common carrier for the plant, and what is an industrial service cannot also be a service of transportation. These principles, we think, should be applied to each of the companies whose affairs are now to be stated. In the brief summary that follows we have endeavored to outline the history of each tap line, its ownership, physical condition, the nature and source of its traffic and revenues, and the manner in which its operations for the proprietary company are conducted. Our finding is that in none of the cases that follow does the tap line perform a service of transportation as a common carrier either in the movement of the lumber of the proprietary company from its mill to the trunk line or in the movement of its logs from the forest to its mill."

For the information of the court it may be stated that the report of the Commission with reference to the tap lines, appellees herein, may be found on the following pages of the report in I. & S. Docket No. 11, 23 I. C. C. R.:

Louisiana & Pacific Railway Company, pages 591-594;

The Woodworth & Louisiana Central Ry. Co., page 327;

Mansfield Railway & Transportation Co., pages 587-589.

Victoria, Fisher & Western R. R. Co., pages 602-603.

When the report of the Interstate Commerce Commission was published in the tap line cases (23 I. C. C. R., 277) it contained no formal order of the Commission and was intended to express the views of the Commission upon the various matters investigated, rather than its mandate. It was intended no doubt as a warning to all parties interested that the opinion expressed the policy of the Commission with respect to criminal prosecutions. Shortly thereafter (May 14, 1912) the Interstate Commerce Commission made a finding that in the cases of (among others) The Woodworth & Louisiana Central Railway Company, the Louisiana & Pacific Railway Company, the Mansfield Railway & Transportation Company, and the Victoria, Fisher & Western Railroad Company:

"The service performed for the respective proprietary lumber companies in moving the logs from their respective forests to their respective mills and in moving the product from the mills to the trunk lines is not a service of transportation by a common carrier railroad and that any allowances or divisions out of the rate on account thereof are unlawful."

Upon the finding made by the Commission on said date the tap lines sued in the Commerce Court to suspend said order, but on June 29, 1912, the Commerce Court dismissed the case for want of jurisdiction upon the authority of *Proctor & Gamble v. United States*, 225 U. S., 282.

Thereupon the petitioners before the Commerce Court, appellees here, by their attorney, L. M. Walter, petitioned the Interstate Commerce Commission to issue an affirmative order (See petition of Louisiana & Pacific

Railway Company, No. 90, in the Commerce Court, pages 51-8) in substance forbidding the tap lines from receiving divisions. And thereafter, on the 30th day of October, 1912, the Interstate Commerce Commission issued the order which is the subject matter of this litigation. The order was predicated upon a finding contained therein, in the case of The Woodworth & Louisiana Central Railway Company, the Mansfield Railway & Transportation Company, the Louisiana & Pacific Railway Company and the Victoria, Fisher & Western Railroad Company:

"That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports."

Said order was directed, not against the tap lines, but against the principal defendants, The Chicago, Rock Island & Pacific Railway Company and all the trunk lines involved, and it was ordered that each of said companies:

"Be, and they are hereby, notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above named parties to the record in respect of any such above described service."

The cases in question came before the Commerce Court upon several questions raised by petitioners (appellees here), among such questions being the one that there was

no evidence in the record to sustain the findings of the Commission, and that the same were purely arbitrary. The Commerce Court, however, did not disturb any finding of fact made by the Commission. Indeed, in the decision of the case in the Commerce Court (*Louisiana & Pacific Railway Company v. United States*, 209 Fed., 247) the court said on page 249:

"The evidence before the Commission tending to show that the petitioning tap lines were originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, might have justified the Commission in finding that these tap lines were not in fact *bona fide* common carriers."

So, also, it appears that the Commerce Court recognized the gravity of the situation which the Interstate Commerce Commission was attempting to correct. On page 253 the court says:

"It is apparent therefrom that very real evils existed, evils demanding correction.

Tap lines, in many instances, were receiving amounts entirely disproportionate to the services rendered by them; amounts based, not upon the cost or the value of the services rendered, if they were transportation services, but upon other and totally illegal considerations. Such payments were, in a large measure at least, secret rebates, and to that extent unlawful. Many tap lines received no allowances for work practically identical with that per-

formed by other lines to which most liberal allowances were given. Moreover, while prior to 1906 divisions and allowances, especially in the form of secret rebates, were made directly to the mills, after the amendment of 1906 the test of the right to receive them, as fixed by the trunk lines, was incorporation of the tap line as a common carrier, although it is clear that incorporation is not essential to the status of an interstate common carrier.

The power of the Commission to prevent such rebates and unjust discriminations is beyond question."

Yet, notwithstanding the gravity of the situation, the imperative call for relief and the admitted power of the Interstate Commerce Commission to grant such relief, the Commerce Court, accepting as true the findings of fact of the Commission, nevertheless held that the Commission must have implied something exactly the opposite to what it expressed, and it based its opinion that the order of the Commission in this case was arbitrary, not upon an examination of facts or evidence in the record, but upon its idea of what the Commission implied, for the Commerce Court expressly said on page 258:

"In view of our conclusions as to the arbitrary character of the distinctions on which the order of the Commission is based, it becomes unnecessary for us to consider the evidence as to each petitioning tap line separately."

It appears therefore that the Commerce Court held that the Commission had done the right thing in the wrong way.

ERRORS RELIED UPON.

Appellants rely upon the following errors:

1. The Commerce Court erred in setting aside the order of the Interstate Commerce Commission.

2. The Commerce Court erred in holding that appellees were common carriers of the traffic of their proprietary lumber companies.

3. The Commerce Court erred in setting aside the order of the Interstate Commerce Commission which was intended to stop illegal transactions or rebates.

4. The Commerce Court erred in holding that the through route of a trunk line could be extended beyond its own rails so as to include an activity or duty of the shipper.

5. The Commerce Court erred in holding that the Interstate Commerce Commission was without power to pierce the device of incorporation in order to ascertain whether the tap line was used as a medium for securing rebates on the lumber companies' traffic, and to prevent such illegal transactions.

6. The Commerce Court erred in finding that the Interstate Commerce Commission had no power to order the trunk line carriers to desist from paying rebates to the lumber companies where the payment was made indirectly through the tap line companies.

BRIEF AND ARGUMENT.

I.

THE TAP LINE DIVISION IS A REBATE AND THE VARIOUS STEPS TAKEN BY APPELLEES IN THEIR ATTEMPTS TO LEGALIZE SUCH REBATE ARE MERE DEVICES TO EVADE THE PAYMENT OF THE PUBLISHED TARIFF RATE IN FULL.

THE INCORPORATION OF THE VARIOUS TAP LINE RAILROADS AND THE OTHER STEPS TAKEN BY THEM WERE FOR THE SOLE PURPOSE OF CONTINUING UNDER THE NAME OF A DIVISION, THE OLD OPEN REBATE WHICH WAS PAID DIRECT TO THE LUMBER COMPANIES. MASQUERADING AS RAILROADS THE LUMBER COMPANIES WERE MAKING THEIR TRAFFIC A MATTER OF BARGAIN AND SALE AND BY THE DEVICE OF A SECRET DIVISION WERE COMPELLING THE TRUNK LINES TO BID AGAINST EACH OTHER IN THE DARK FOR SUCH BUSINESS. SUCH WAS THE FINDING OF THE INTERSTATE COMMERCE COMMISSION.

As appears most plainly the incorporation of the various industry tracks as railroad companies was for the purpose of continuing the old rebating system which had been forbidden by the Commission in the Yellow Pine Case, and which was plainly violative of the Act to Regulate Commerce.

Indeed, it was said by this court in the case of *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S., 441, 444, in dealing with the precise situation under consideration (*italics ours*):

“The railroads west of the Mississippi make a certain allowance to the mills which have ‘logging roads’—that is, roads by which logs are hauled from the timber to the mills. This is called ‘tap-line allowance

or division.' * * * The mills east of the river have logging roads also, but appellants make no allowance to them. * * * There does not appear to be any reason for such allowance west of the Mississippi which does not apply east of that river, *and it amounts to a rebate or reduction from the regularly published rate, and gives an advantage to the mills west of the Mississippi over those east, although the published rates from both are the same.*"

The main contention of the tap lines in this case is that they are now incorporated common carriers and therefore they are in fiction, if not in fact, entirely separated from the lumber companies. The fallacy of this view is that the actual character of the traffic carried on by the logging roads, which are in reality plant facilities and are constructed and operated as a part of the general machinery and as one of the regular facilities used in lumbering enterprises, never changed; that the separation from the mill was nominal only and the tap-line railroad in substance is just as much a plant facility as though the charter had never been obtained. It may also be stated that the amount of the tap line division depends largely upon the number of trunk lines which compete for the lumber company's business. Most of the traffic of these tap line roads is lumber of the mill company which controls them.

The fact being admitted, then, that these tap lines are incorporated, does that change what would otherwise be a rebate into a lawful allowance. And by this mere formal application for a charter, is the law satisfied and all objections to the old illegal practice removed?

It must be remembered that this proceeding is brought before a Commission created under a law the underlying principle of which is to forbid undue preferences, discriminations and rebates from legal rates and that one of the most important provisions in that law is that a car-

rier may not give to a shipper a concession or rebate "*by any device whatsoever.*"

If it is held that the mere incorporation of a plant facility legalizes a rebate, then your Honors would authorize an easy device which will be seized upon to emasculate the Act to Regulate Commerce.

The fact that the rebate is paid in the way of a division to an incorporated railway company cannot disguise the real transaction. The money goes to the lumber company, the real owner of the railroad company, and by this method the mills owning tap lines obtain a decided advantage over the other mills which have not incorporated their tap lines; and indeed the incorporated tap line which receives only 1 cent because it has only one trunk line connection is discriminated against by its neighbor which receives 6 or 7 cents because it is fortunate enough to connect with three or four trunk lines.

But there is no halo about a paper charter or the theory of incorporation which prevents the Commission or the courts from searching into the actual results. Corporations and their fictions are much older than the Act to Regulate Commerce and in judicial history many attempts may be found to practice fraud under the cloak of incorporation.

Heretofore, however, courts have had no difficulty in getting behind the legal fiction of a separate legal personality, resulting from an incorporation, in order to ascertain who are really benefitted by the same to see whether the scheme is not merely designed to circumvent the law or to perpetrate some fraud whether upon creditors or upon the public in general. This court will be as readily able to see through the subterfuge and to decline to lend its aid in setting aside the judgment of the Interstate

Commerce Commission and thus assisting these parties to secure an unjust advantage over their competitors.

The Interstate Commerce Law in a number of provisions is particular to cover any kind of device which may result in discriminations as between shippers. The Elkins Law made it unlawful to grant or solicit any rebate, concession or discrimination in respect to interstate transportation whereby property should "*by any device whatsoever*" be transported at less than the tariff rate. The second section of the law, on the subject of unjust discrimination, makes it unlawful for any common carrier *directly or indirectly by any special rate, rebate, drawback, or other device, etc.*, to charge one person a greater compensation than another for a similar service. The third section is even broader in forbidding the giving of an undue or unreasonable preference or advantage to one person or subjecting another to an undue or unreasonable prejudice or disadvantage *in any respect whatsoever*. Other provisions of that law might also be pointed out which would show that its spirit is not to be violated by any device which might be trumped up, concocted or resorted to by crafty and ingenious minds.

The Interstate Commerce Commission held that the service performed by the tap line for the proprietary lumber company in moving logs from the forest to the mill or in switching cars of lumber between the mill and the trunk line was not a service of transportation by a common carrier railroad, and that after the incorporation of the tap line the situation was not changed. The Commission held that in respect to such services the tap line was simply an instrumentality or agency of the lumber company adopted and used by the latter to perpetuate the concessions or rebates from the regular rate which had theretofore been received by the lumber company, and

that this resulted in unlawful or undue discrimination. It was obvious to the Interstate Commerce Commission that notwithstanding the act of incorporation and the professions of the tap line as to holding itself out as a common carrier, the lumber company was simply masquerading through the guise of an incorporated tap line to secure concessions indirectly which it could not legally obtain directly.

In administering such a statute as the Interstate Commerce Law the Commission acting on behalf of the Government or the public should view, as it did, matters in a practical way and get at the real substance of the transactions, and it should not be prevented from inquiring into the facts and enforcing the law by any theoretical rule or legal fiction which might separate the corporate entity of the tap line from the lumber company. The Commission is created for the purpose of seeing that the Interstate Commerce Law is not evaded or its provision circumvented by any mode or manner of device, scheme or subterfuge. Its duty is to see and determine whether from a practical and actual working standpoint the scheme or device attacked is one intended to or which does in fact tend or result in giving some favored shippers concessions from the regular rate or undue discriminations as against competitors. The federal law can not be evaded by a resort to incorporation under a state statute, for all that may be done under the state statute is subject to the paramount federal law.

Thus in the case of *Northern Securities Co. v. United States*, 193 U. S., 197, an attempt was made to circumvent the Sherman Anti-Trust Law by the device of a holding company formed under the laws of New Jersey, to which holding company was transferred by individual stockholders of the Northern Pacific Company and the Great

Northern Company their stock, thus placing under a single control, through ownership of a majority of stock of each competing line, the management or control of two competing lines.

This court characterized that plan as a mere device, looked through the corporate fiction of the holding company and the purpose of its formation, and found that it was intended to and in fact did result in stifling competition and was, therefore, violative of the Anti-Trust Law. The holding company was ordered to dispose of its stock in the two competing railways.

While it is true perhaps that each of the steps taken by the tap lines and lumber companies in pursuance of this scheme might be called legal, yet they result in an illegality. So it was held in the case of *Swift & Company v. United States*, 196 U. S., 375, that even if the separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful.

So also in the case of *Brundred et al. v. Rice*, 49 Ohio St., 640; 32 N. E., 169, a transportation company was organized to operate a pipe line, but largely for the purpose of securing rebates to the promoters who were shippers of oil. In a suit brought by another shipper, a competitor of the promoters, to recover damages on account of unlawful discrimination, a judgment was awarded in his favor, it being held that the incorporation of the transportation company by the promoters was a mere subterfuge for the illegal purpose of securing to them discriminatory rates and rebates. In that case it was held that rebates to a corporation controlled by a shipper were illegal and violative of the Ohio statute.

The Interstate Commerce Commission, of course, is

vested with all the power of the Government to investigate violations of the law and to make necessary administrative orders to stop a continuance of such violations. Acting for the government and on behalf of the public it stands in the same position as did the representatives of the government in the Northern Securities case, in a proceeding in equity to restrain a violation of the Anti-Trust Law. This controversy is not between private individuals, but is one between the Government or the public on the one side and certain shippers and tap lines on the other side, alleged to be violating the law, so that the Commission is not precluded by the mere charter or professions of the tap line incorporation papers to inquire whether it has been utilized and is being used as a device to circumvent the prohibitions of the Interstate Commerce Law.

In the case of *United States v. Milwaukee Refrigerator Transit Co. et al.*, 142 Fed., 247, parties who controlled a brewing company which was a shipper of beer organized and controlled a transit company which would control the shipments and secure commissions from railway companies on such shipments. It was held that such commissions were merely unlawful rebates and that the incorporation was a mere subterfuge or device to evade the provisions of the Interstate Commerce Law. On page 255 the court said:

"When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. This much may be expressed without approving the theory that the legal entity is a fiction, or a mere mental creation; or that the idea of invisibility or intangibility is a sophism."

On the same page it is said:

"A corporation, from one point of view, may be considered an entity, without regard to its shareholders, yet the fact remains self-evident that it is

not in reality a person or thing distinct from its constituent parts. The word corporation is but a collective name for the members who compose the association." (Citing a number of authorities.)

So in the case of *Taenzer & Company v. C., R. I. & P. Ry. Co.*, 191 Fed., 543 (C. C. A., 6th Cir.), an action was brought by a shipper against the railway company to recover damages for breach of contract between the plaintiff, a lumber company, and the defendant, an interstate railroad company, by which the plaintiff agreed to build a private track on its own lines connecting with defendant's line, and to ship all of its product, with a certain exception, over defendant's road, in consideration of which defendant agreed to furnish cars to carry plaintiff's product at certain rates, which were divided between the shipper and the carrier, and which, therefore, resulted in the shipper obtaining a less net rate than was established and published in the tariffs. This contract was held to be illegal and void as in contravention of the Interstate Commerce Law.

See, also, *Taenzer & Co. v. C., R. I. & P. Ry.*, 170 Fed., 240 (C. C. A., 6th Cir.), where it was held that a spur railway line built by a lumber company on its own land, forming a connecting line between a railroad and its mill for the sole purpose of transporting its own products to the railroad for shipment, was not a common carrier.

By a purely legal fiction a corporation is regarded as a distinct legal entity or person, in fact representing, however, the interests of its aggregate membership. The legal fiction is resorted to merely for convenience to enable the members to transact business or engage in undertakings in a lawful and orderly manner. But said Story, J., in *United States v. Bags of Coffee*, 8 Cr., 415, "fictions of law shall not be permitted to work any wrong." So Mr. Justice Holmes said in *Blackstone v. Miller*, 188 U. S., 206,

"when logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."

As stated heretofore, courts have frequently and especially of late years, gone behind the corporate fiction and ascertained who were the real parties in interest in order to prevent the carrying out of either some fraud or some circumvention of the law.

In 1 Cook on Corporations, Sixth Edition, Section 6, pages 31-32, it is said:

"But there are occasions where the courts will ignore the corporate existence and will hold that its acts are the act of its stockholders and *vice versa* the same as in a partnership. Thus, where an individual organizes a corporation to violate a contract which he himself would not be allowed to violate, the court will enjoin the corporation as though it were the person himself. So, also, where a director causes the corporation to give a valuable contract to a corporation in which he is secretly interested, this may be the same as though he were interested in a firm which received that contract. Property acquired by and in the name of a 'dummy' corporation may be held to be subject to a mortgage executed by the owner of such 'dummy' corporation. A contract between three local companies by which one runs over the tracks of another for a consideration paid to the third is legal as to the second corporation where such second corporation is a mere dummy of the third corporation and the earnings of both corporations go together. Where one family own all the stock of a mercantile corporation and one of them is president and has entire control and management of its affairs and he wilfully fires the property in order that the insurance may be collected, the insurance company is not liable.

Where one corporation owns all the stock and purchases all the property for another corporation, and employs a person to do work for the latter, it is liable for his wages on the ground that the subor-

dinate company was merely an agency or instrumentality for carrying out the purposes of the former. A corporation may be held liable for the fraud of its board of directors against another corporation which the same board controlled. The New York Court of Appeals have said: 'We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth.'

This same principle applies to trade combinations of corporations called 'Trusts.' The corporate existence will be disregarded and the acts and contracts of the persons holding all the stock will be the acts and contracts of the corporation itself, where the effect is the same as though the corporation had acted or contracted as a corporation. Hence, where all the stock is combined with all the stock of other companies in order to form a combination which is illegal, the state will forfeit the charter of the corporation, although technically it is not a party to the agreement."

In 2 Cook on Corporations, Sixth Edition, Sections 663 and 664, it is said on page 1972:

"The disabilities of the corporation are not disabilities of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized to act as a 'cloak' for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud. Thus, it has been held that, where a person has contracted that he will not do a certain act, he cannot form and control a corporation and have the corporation do that act. And where a bankrupt practically owns the entire capital stock of a corporation, the bankruptcy court will consider the corporation as merely an agent of the partnership, and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns."

In Note 1, the following language *In re Rieger, etc.*, 157 Fed., 609, is quoted:

"The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankrupt act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

On page 1974, 2 Cook on Corporations, Sixth Edition, Section 663 and 664, the author continues:

"Where it would be illegal for two or more corporations to unite in regulating the production and price of an article, it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing co-operating boards of directors.

There are many other instances in which the corporate existence will not suffice to evade liabilities, disabilities, and frauds. An individual or partnership cannot transfer all of his or its property to a corporation for shares of stock and thereby defraud the creditors of the partnership. The officers and agents of a corporation who cause the corporation to defraud its creditors or subscribers to its stock by means of fraudulent misrepresentations are liable to the persons so defrauded."

See also pages 1975, 1983, 1984, 1985, 1986 and 1987.

In several instances this court has gone back of the corporate fiction to ascertain whether a corporation was organized mainly for the purpose of invoking the jurisdiction of the Federal courts in respect to controversies concerning title to property or other matters affecting a corporation which could not invoke such jurisdiction. In those cases the stockholders of a local or domestic company caused to be incorporated a foreign corporation and the property of the domestic company was transferred to

the foreign corporation. The court, however, looked through the subterfuge and determined it was unavailing to accomplish the purpose intended even in such indirect manner.

See:

Miller & Lux v. East Side Canal Co., 211 U. S., 293.

Lehigh Mining and Man'g Co. v. Kelly, 160 U. S., 327.

In *Kendall v. Klapperthal Co.*, 202 Pa. St., 596, 52 Atl., 92, where, in order to develop the property of a land company, its stockholders organized a railroad company, also a light, heat and power company, the respective interests of the various companies being practically the same, it was held that the land company might legally endorse and guarantee the notes of the other companies. The court said:

"For purposes of equity, courts will look behind that artificial personalty, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation (citing cases); and that is what, in justice and fairness, must be done here, where practically the same persons were associated together for one common purpose, under three or four different names, corresponding to the several branches of the single common enterprise, and acted together only formally as distinct organizations, each devoted to the corporate pursuit of its appropriate branch."

In *Watson v. Bonfils*, 116 Fed., 157, where a bank, in order to handle real estate which it acquired on foreclosure organized a corporation, and owned all the stock and was the sole creditor of such corporation, the object of the whole transaction being to conceal the amount of money the bank had invested in real estate, the transaction was held fraudulent as to creditors of the bank and

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the real estate was held attachable as the property of the bank.

In *Seymour v. Spring Forest Cemetery Ass'n.*, 144 N. Y., 333 and 340, it was said:

“The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth.”

The same view is taken and the same process adopted by the courts in determining whether there would not be a violation of the Interstate Commerce Law or state laws on the subject of rebates and discriminations. In 2 Cook on Corporations, Sixth Edition, Sections 663 and 664, it is said on page 1975:

“Where a corporation secures a rebate from a railroad company, not only on shipments made by the former, but on shipments made by other parties, the active agents of such corporations receiving such moneys may be held personally liable for them. The court said that inasmuch as the company ‘was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense.’ ”

In the recent case of *Martin v. Martin Co.*, Court of Chancery of Delaware, October, 1913, 88 Atl., 612, where the defendant holding the corporation, in which the complainants were stockholders, owned the stock of seven or eight other corporations engaged in the same business and financed them, and all of the directors of four of such companies were also directors of defendant corporation, while a majority of the directors of the others were directors of the defendant, and the president of the defendant was also the president of seven of such other corporations, it was held in a proceeding to compel the

defendant to produce the books of the various companies, for discovering whether defendant was fraudulently mismanaging its corporate affairs, that the subsidiary corporations shall be regarded by a court of equity as mere instrumentalities of the defendant, and that such defendant will be compelled to produce the books of such companies, as well as its own books, for discovery.

The fundamental principle of that decision is that the fiction of a legal corporate entity will be ignored when used to shield fraudulent or illegal acts.

See also *Hunter v. Baker Motor Vehicle Co.*, 190 Fed., 665, where it was held that the legal fiction of distinct corporate existence will be disregarded when necessary to circumvent fraud, or where one corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of the other.

Passing from these cases which announce the general principle that incorporation cannot cover fraud, we come to cases involving the same principle but with reference to facts almost identical with the facts in this case.

In the case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission and E. H. Young*, 219 U. S., 498, this court had before it the question whether the incorporation by the Southern Pacific Co. of a terminal company sufficiently individualized and separated these companies, in a case arising under the Interstate Commerce Law. The court affirming the order of the Interstate Commerce Commission said on page 521:

“Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a

union of them if we regard their control and operation through the Southern Pacific Company. *This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts.*"

On page 522 it was further said:

"As well said by the Interstate Commerce Commission, 'a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. * * * The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority.'"

And the court further said:

"*In opposition to these views appellants urge the legal individuality of the different railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoint as legal entities; may have in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it.*"

In that case this court ignored the fiction and recog-

nized the fact; it disregarded the form and sought for the substance.

In the case of *United States v. Union Stock Yard & Transit Co.*, 226 U. S., 286, the court said on pages 307, 308 and 309:

“By Section 2 of the Act to Regulate Commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced. By the very terms of the contract it is evident that the interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfaelzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive \$50,000, and it obligates them to maintain and operate the plant for a period of fifteen years and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so bought to pay the regular charges thereon as if the same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of \$50,000, with the bonus given to the Pfaelzers for the location of their plant in juxtaposition to the stock yards. The only interest which the Stock Yard Company has in Pfaelzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Com-

pany in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfaelzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departure from published rates—and we must consider the case in that light—and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatever and to prohibit practices which ran counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract.”

In the case of *Taenzer & Co. v. C., R. I. & P. Ry.*, 170 Fed., 240 (Circuit Court of Appeals, Sixth Circuit, April, 1909), where the facts were fairly representative of the facts in the cases at bar as to ownership, operation and purpose of a certain logging road. Shortly before that proceeding was instituted the logging road was incorporated in the name of the St. Francis River Railroad so that it appeared in court as a common carrier just as much as most of the tap lines that are now claiming to be common carriers. But the court said on page 248, referring to the circumstances and conditions which it is claimed made the St. Francis Railroad a common carrier:

“They cannot overcome the fact, which clearly stands out, according to the proofs given or offered, that the so-called railroad was intended, both by the

railroad company and the lumber company, merely as a spur to the mill for the purpose of enabling the lumber company, not as a carrier but as a shipper, to transport its forest products over the line of the Choctaw Road; that, throughout, the lumber company's relation to the railroad company was in fact that of shipper. * * * The terms used and the provisions relied upon as establishing the status of common carrier cannot prevail against the considerations that this lumber and logging road had no rolling stock suitable for any purpose except logging; that there was in the neighborhood no cotton or other merchandise to ship, and no inhabitants to serve as carrier, either in the relation of passengers, shippers, or consignees."

Nor was the question new to the Interstate Commerce Commission. As long ago as March, 1905, the Commission had before it the matter of divisions of joint rates and other allowances to terminal railroads, Docket No. 735, 10, I. C. C. R., 661.

In the first case there considered the Eclipse Transfer Company was organized for the purpose of obtaining an allowance made to transfer companies of 5 cents per hundred pounds from East St. Louis to St. Louis. The Eclipse Transfer Company was organized for the sole purpose of obtaining these allowances. It used teams owned by the Simmons Hardware Company and used the storehouse of the latter for a receiving depot. The Grant Chemical Company also received a similar allowance for such service. It was held that the payments to the Grant Chemical Company and the Eclipse Transfer Company were illegal.

In the second case there considered the Granite City, Alton & Eastern Railroad was organized for the purpose of operating several thousand feet of railway used in the business of the St. Louis Syrup & Preserving Company and located on the latter's private ground at Granite

City, Illinois. The Granite City Company had constructed a short track outside the limit of the Preserving Company's ground and used jointly with other parties a second track about 3,000 feet long, by means of which it connected with trunk line railroads and was paid by the latter certain divisions of the rate on traffic shipped by the Preserving Company and hauled to such connections by the Granite City, Alton & Eastern Railroad. The Commission, assuming the identity of ownership of the Preserving Company and the Granite City Company, held that the payment to the Granite City Company constituted a rebate and was illegal.

In the third case the Illinois Terminal Railroad Company was organized in the interest of the Illinois Glass Company and used tracks constructed by the latter on its private grounds at Alton for the sole purpose of connecting its plant with different lines of railway. On pages 667 to 672 details of the construction and operation of the terminal road are stated and they are very much like the fact in the case at bar. The Commission held that the allowance made to the terminal railroad was illegal and amounted to no more than a rebate. The opinion is by Mr. Commissioner Prouty.

In the case of *General Electric Company v. New York Central & Hudson River R. R.*, 14 I. C. C. R., 237, it was held that a manufacturing company, which owned and operated several miles of road connecting with trunk line railroads, was not entitled to compensation from the trunk lines to cover the cost of the movement of loaded and empty cars between the interchange tracks and its shops and foundries within the inclosure. It was held that the General Electric Company did nothing in this switching of its cars to the railroads which could have been lawfully demanded of the trunk line railroads. The

General Electric Company had 12 miles of standard gauge track. The allowance for switching the cars was 1 cent per hundred, or 20 cents per ton, for this service. It might also be stated that in 1906 when this information came to the United States Government indictments were returned against the trunk line railroads on the charge of having unlawfully paid rebates to the General Electric Company.

See also the case of *Solvay Process Co. v. Delaware, Lackawanna & Western R. R. Co.*, 14 I. C. C. R., 246. In that case the Solvay Process Company was receiving \$3 a car for services in transferring cars from its plant to the interchange tracks of the trunk line railroads. The plant had about 12 miles of track, 6 locomotives and 175 box, tank and flat cars. The haul performed by the Solvay Company was from 700 to 1,500 feet. The Commission by Mr. Chairman Knapp said on page 249:

"We find that the switching service performed by complainant (Solvay Process Company) within its plant is not a service which it can lawfully call upon defendants to perform for it, and consequently is not a service for which it may lawfully demand compensation."

See also the case of *Crane Railroad Co. v. Philadelphia & Reading Ry. Co.*, 15 I. C. C. R., 248, opinion by Mr. Chairman Knapp, in which the Commission refused the complainant, a railroad company having 1.9 miles of track, connecting the Crane Iron Works and five other industries at Catasqua, Pennsylvania, with defendants' tracks, an allowance of \$2 per car per round trip.

In the case of *Crane Iron Works v. Central Railroad Co. of New Jersey*, 17 I. C. C. R., 514, the Commission held, by Mr. Commissioner Prouty, that the service performed by the Crane Railroad Company in the case last cited, for the complainant in the present case, the Crane

Iron Works, was that of a plant facility, the expense of which should be borne entirely by the Iron Works and which no railroad under the guise of the absorption of a switching charge might lawfully sustain.

In *In re Transportation of Salt from Hutchinson*, 10 I. C. C. Rep., 1, the Commission investigated the operation of the Hutchinson and Arkansas River Railroad Company, which owned between four and five thousand feet of railway track adjoining the plant of the Hutchinson Salt Company. The railroad company had acquired its track from the Salt Company and the ownership of the railroad company and the Salt Company was held by the same common stockholders. The Railroad Company owned no equipment or rolling stock and did not serve the public, but it received 25 per cent. of the rates on salt as its division. The Interstate Commerce Commission, by Mr. Commissioner Prouty, held that the granting of the division of the rate to the so-called railroad was a mere subterfuge to give a concession in the rate and was, therefore, unlawful. This case was referred to the Department of Justice for action.

In the case of *Chicago & Alton R. R. Co. v. United States* (C. C. A., 7th Cir., 1907), 156 Federal, 558, the Schwarzschild & Sulzberger Company owned private tracks to a plant on its own property extending to a connection with the tracks of a belt line company. The Packing Company did not own or furnish any cars. The Alton Railroad Company refunded to the Schwarzschild & Sulzberger Company \$1 a car as terminal charges for the use made of the S. & S. Company's tracks in getting the cars of freight out upon the Belt Line's railroad. At the conclusion of the Government's evidence the Alton Railroad Company moved the court to instruct the jury to find the defendant not guilty. The motion was overruled. There-

upon the Alton Railroad Company offered to prove that the use of the S. & S. Company's tracks was reasonably worth \$1 a car, but the court refused. The Circuit Court of Appeals affirmed the judgment of the lower court. The case was also affirmed by this court. In this case the action was a criminal one to fine the Railroad Company for giving rebates.

See also the recent decision of the Interstate Commerce Commission in the Industrial Railways Case, 29 I. C. C. R., 212.

In the light of these cases it is difficult to see in the tap line allowance anything but a device to effect a rebate. It is too easy to obtain a charter—and if a shipper with a tap line charter may accept a rebate an easy way to evade the law is presented.

Courts of equity have never defined "Fraud" because as was explained by a learned English chancellor if a court once went into details as to what constituted fraud unscrupulous persons would soon frame up a plan which would be outside of the definition but yet would accomplish the same result, and for that reason to this very day equity courts have declined to make a rule which crafty persons might easily contrive to circumvent.

If it should be held that a shipper owning a paper railroad charter is entitled to a rebate the big shipper will be afforded the easiest way yet suggested to evade the Act to Regulate Commerce.

With this statement of the real issue in the case we pass to a consideration of the points made by appellees before the Interstate Commerce Commission and the United States Commerce Court.

II.

THE POINTS RAISED BY APPELLEES BEFORE THE COMMERCE COURT AND BEFORE THE INTERSTATE COMMERCE COMMISSION ARE WITHOUT MERIT.

In the Commerce Court the following points were made by the appellees :

“1. The service performed by each of the petitioner railroads herein is a service of transportation by a common carrier railroad within the meaning of the Act to Regulate Commerce.

2. The petitioner railroads are not plant facilities and do not perform a plant facility service for the petitioner lumber companies herein.

3. There was no evidence upon which the Commission could base its finding that the participation by the petitioner railroads in joint rates upon the logs and lumber of the petitioner lumber companies constitutes an undue and unreasonable preference or subjects any party to unjust discrimination within the meaning of the Act to Regulate Commerce.

4. The Commission's order results in undue and unreasonable preference and unjust discrimination within the meaning of the Act to Regulate Commerce.

(a) As between common carriers subject to the Act to Regulate Commerce.

(b) As between shippers.

5. The order deprives the petitioners of their rights under the Constitution of the United States.

6. The order of the Commission expressly overrides the exception contained in the commodities clause of the Act to Regulate Commerce.”

These points we shall discuss *seriatim*:

Points 1 and 2.

“1. The service performed by each of the petitioner railroads herein is a service of transportation by a common carrier railroad within the meaning of the Act to Regulate Commerce.

2. The petitioner railroads are not plant facilities and do not perform a plant facility service for the petitioner lumber companies herein."

It was the contention of the tap lines that in some way not understood by us, the rebate in question was authorized by the law because the word "transportation" appears in Section 1 of the Act to Regulate Commerce, on the theory that the word "transportation" as used in that Act meant the mere act of carrying. But in using this argument they lose sight of the fact that the term "common carrier" is associated with the word "transportation," the language being: "any *common carrier* or *carriers* engaged in the *transportation* of passengers or property." On the premise, then, that transportation means a mere carrying they state that the tap lines are engaged in transportation and are therefore in all respects common carriers under the Act to Regulate Commerce and are entitled to all the rights and privileges of common carriers, including the right to make joint rates and agree upon divisions thereof. But if, as found by the Commission, the tap line is a mere instrumentality of the lumber company, it is of no importance that the tap line is engaged in transportation for the lumber company because before the tap lines were organized the lumber companies were engaged in their own "*transportation*" to the same extent that the tap lines are now engaged in "*transportation*." The tap line as was found by the Interstate Commerce Commission is a mere agency of the lumber company and is therefore as to the traffic of the lumber company no more a common carrier than would be the lumber company itself. Being an agency of the shipper the tap line cannot secure indirectly for the shipper that rebate which the shipper could not have secured directly. The point we are here making is plainly set out in the opinion of the Commerce Court in the case of

Crane Iron Works v. United States, 209 Fed., 238, where it is said in a case exactly like this, on pages 242 *et seq.*:

"But the dismissal order in question rests upon another basis, which will be briefly considered. Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works, and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Company v. N. Y. C. & Y. R. R. Co. et al.*, 14 Interst. Com. Com'n R., 237; *Solvay Process Company v. D., L. & W. R. R. Co.*, 14 Interst. Com. Com'n R., 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

But the argument is earnestly pressed that such a relation cannot as matter of law be predicated of an incorporated railroad which is declared to be a common carrier by the fundamental law of the state of its creation. In other words, it is insisted that the Crane Railroad, being in law a common carrier and performing the functions of a common carrier, cannot be a plant facility of the Crane Iron Works, but must be regarded as a common carrier for the Crane Iron Works, and entitled as a matter of legal right to a just share of the transportation charge which the Central Railroad makes and collects for carrying the traffic of the iron works; and on this theory it is argued that the finding and conclusion of the Com-

mission involve an error of law which this court should correct.

We are constrained to reject this contention. Whether the Crane Railroad is a plant facility as to the Crane Iron Works or a common carrier of the traffic of that concern must be held to be a question of fact which is not affected by the circumstance of incorporation. We understand it to be admitted that the operations of this railroad when it was owned and operated by the iron works were the operations of a plant facility. It is contended, however, when the railroad was separately incorporated and passed from the ownership of the iron works, that its relation to the latter and the legal character of its services became immediately changed. That is to say, the mere fact of the separation of ownership and the transfer of the title and control of the railroad property to a new corporation, although there was not the slightest change in what was actually done, operated in legal effect to transform a plant facility into a common carrier and to impose obligations on the Central Railroad, as to the traffic of the iron works, which it could not theretofore have been required to assume. We cannot believe that any such result was accomplished. The rights and duties of the Central Railroad respecting the iron works could not thus be altered. If its obligations as a common carrier were fully discharged and its tariff rate earned by delivering cars to and taking them from the exchange tracks before the iron works parted with its railroad, its rights and duties respecting that concern were neither increased nor diminished by the creation of the Crane Railroad. The services rendered to the iron works continuing to be precisely the same in point of fact, this railroad continued to be utilized as the facility of the iron works' plant in the same way after as before incorporation.

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers. Whether considered from the standpoint of law or of practical administration, it seems reasonable to hold, as the Commission virtually held

in this case, that a railroad of the kind in question may have this dual character and perform services for one concern which are not the services of a common carrier, but which that concern is bound to provide for itself, notwithstanding it occupies the relation of a common carrier to other concerns and the public generally. Concededly, the work which the Crane Railroad does in moving cars between different points in the iron works' plant has none of the incidents of common carriage, and why may not the same thing be affirmed of the work it does in switching cars for the iron works to and from the exchange track with the Central Railroad, even if the work it does for the other industries makes it as to them or the shippers of Catasauqua a common carrier?"

It seems quite clear that a common carrier is one who carries for every one or the public in general, and not one who carries principally for himself. Indeed, in so far as a railroad company may carry free for its own use or in its own interest it is a private carrier and as to such traffic the railroad company is not subject to the prohibitions of the Interstate Commerce Law aimed against common carriers.

Santa Fe, Prescott & Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S., 177.

Yet no one would contend that the railroad company because it is a common carrier could lawfully, in respect to its own property, prefer itself directly or indirectly in respect to the transportation or marketing of the same over that of other shippers.

See:

New York, N. H. & H. R. R. Co. v. Interstate, etc., 200 U. S., 361.

An argument persisted in by appellees in the Commerce Court and before the Commission was that in condemna-

tion cases some courts have held that the land owner could not question the legality of incorporation purpose for which the road was being constructed. Of course the cases relied upon were all cases between a railroad company and a private individual, in which the courts refused to inquire into the legality of the incorporation or the ulterior motive for condemning the land, holding that such questions could only be inquired into at the instance of the state in *quo warranto*. Of course such question might be inquired into by the state or Government in any direct proceeding by any tribunal duly constituted for that purpose in order to determine whether the purpose of incorporation or whether the attempted exercise of power was lawful or merely an abuse. Thus in the Northern Securities case, *supra*, the proceeding was in equity under the Federal Anti-Trust statute and the investigation went into matters which could not have been reached in any private inquiry. Under the Interstate Commerce Law the Commission is given ample power to investigate and determine whether the thing resorted to is a mere device or makeshift utilized to circumvent the prohibitions of that law. In other words, that law is administered by the Commission for and on behalf of the public and the same reasoning does not apply which was used by the courts in condemnation cases between a railroad company and a private party in which the controversy was wholly between private parties, and in which, of course, the court was justified in confining the case to a consideration of the power under the charter of the company and its professed purposes for condemning. Matters of public concern, of course, could not be litigated in such private suits.

Yet in many cases where roads of this character have come before the courts upon matters requiring the court

to ascertain their true nature, it has been held that they were not common carriers. Thus, for instance, in the case of *Wade v. Litcher & Moore*, 74 Fed., 517, the Circuit Court of Appeals for the Fifth Circuit, reviewing the judgment of the Circuit Court of the United States for the Eastern District of Louisiana, held that a logging railroad was not to be considered as a real railroad and was not subject to the liability of a railroad company. They further held that Article 244 of the Constitution of Louisiana, providing that all railroads are public highways and all railroad companies are common carriers does not have the effect of making a business corporation organized to construct and operate a sawmill and a railroad in connection therewith, which constructs a logging railroad on its private grounds and operates the same for private purposes, a common carrier, charged with the duties and responsibilities imposed by law on such carriers. Wade was suing for injuries received while a passenger on this railroad. The court said on page 521:

“But for the earnestness with which the argument was presented in this court, we would not suppose that the learned counsel would seriously contend that article 244 of the state constitution, dealing with corporations of public improvement and public utility, was intended to, or could be so construed as to, make out of a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for private purposes, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because it is a railroad, and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation, appurtenant to the sugar mill, and used for carrying cane thereto, should be declared a common carrier. The Supreme Court of the State of Louisiana, while not squarely deciding the matter in hand, has decided that a corporation or-

ganized to carry freight and passengers between two sugar plantations about five miles distant from one another, and which, it was charged, was not a corporation organized for public purposes, but was a combination of individuals, whose sole object was to foster the private ends of two certain persons named, who owned jointly two sugar plantations, and who wished to transport the sugar cane grown on one of the plantations to the refinery situated on the other, was not, *ex necessitate*, such a corporation for public improvement as would authorize the expropriation of private property for its purposes. *Williams v. Judge, etc.*, 45 La. Ann., 1295, 14 Southern, 57."

See, also:

Demko v. Carbon Hill Coal Co. (Circuit Court of Appeals, Ninth Circuit, 1905), 136 Fed., 162.

Williams v. Northern Lumber Co., 113 Fed., 382.

Eastern & Western Ry. Co. v. Rayley, 157 Fed., 532.

See also the case of *Taenzler & Co. v. C. R. I. & P. Rld. Co.*, 170 Fed., 240 (C. C. A., 6th Cir.).

So in the case of *McKilvergan v. Alexander & Edgar Lumber Company* (Supreme Court of Wisconsin, 1905), 102 N. W., 332, it was held that a statute of Wisconsin which makes a railroad liable for damages sustained by employes caused by the negligence of other employes has no application to a lumber logging road. That road was owned by the lumber company and an action based on the liability of a railroad company was brought under Section 1861 of the Laws of Wisconsin of 1898, which provides as follows:

"The phrase 'railroad corporation' as used in the statutes, may be taken to embrace any company, association, corporation or person, managing, maintaining, operating or in the possession of a railroad,

whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

The court said:

"The difference between such a railroad (referring to a real railroad) and one used as an incident to conducting a private business is readily perceived and understood, without elaboration. The objects and uses of the one are far removed from those of the other, though the instruments of operation, such as tracks, cars, and engines, may be common to both."

The court held that the logging road was not a railroad.

It ought to be obvious that a shipper cannot by obtaining a state charter nullify the Interstate Commerce Act.

Another point made by the tap lines is that by the charter which each line obtained from the state it was endowed with the right to accept a division of a freight rate. The counsel evidently go on the theory that part of the duty of the state is to transport freight and passengers and consequently when the state chartered the railroad it conferred or delegated that duty to these tap-lines. This is only another way of saying that the state has power to nullify the Federal power over interstate commerce. The same theory was advanced to this court in the cases recently decided by it known as the Corporation Tax Cases (220 U. S., 107). These cases involved for the consideration of the Supreme Court the application of the Federal Corporation Tax Law to corporations of various kinds including railroad corporations. The railroad corporations sought to carve for themselves an exception from the application of the law on the same theory. On page 171 Mr. Justice Day said in disposing of this contention:

"We come to the question: Is a so-called public

service corporation, such as The Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of *South Carolina v. United States*, 199 U. S., 437, this court held that when a state, acting within its lawful authority, undertook to carry on the liquor business it did not withdraw the agencies of the state carrying on the traffic from the operation of the internal revenue laws of the United States. If a state may not thus withdraw from the operation of a federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the federal right to reach such properties and activities for the purposes of revenue.

It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate federal taxation.

Applying this principle, we are of opinion that the so-called public service corporations represented in

the cases at bar, are not exempt from the tax in question."

The absurdity of this contention is that if the state government could withdraw one function of a railroad incorporated by it from the operation of the Act to Regulate Commerce it could withdraw other functions and thus one state could utterly destroy the Federal power over interstate commerce.

POINT 3.

The third point of appellees raised in the Commerce Court is as follows:

"3. There was no evidence upon which the Commission could base its finding that the participation by the petitioner railroads in joint rates upon the logs and lumber of the petitioner lumber companies constitutes an undue and unreasonable preference or subjects any party to unjust discrimination within the meaning of the Act to Regulate Commerce."

The Commission, however, made such a finding and made it upon substantial and almost uncontradicted evidence. The Commerce Court did not find that there was no evidence to support such finding of the Commission. The evidence was sufficient.

Illinois Central Railroad Co. v. Interstate, etc.,
206 U. S., 441, 454.

Interstate, etc., v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S., 88.

Proctor & Gamble Co. v. United States, 225 U. S., 282.

Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., 88.

POINT 4.

Point 4, upon which great stress was laid by the tap lines in the Commerce Court, is as follows:

"4. The Commission's order results in undue and unreasonable preference and unjust discrimination within the meaning of the Act to Regulate Commerce.

(a) As between common carriers subject to the Act to Regulate Commerce.

(b) As between shippers.

Even if the facts at all supported the theory of this objection it would be sufficient answer to say that it is no objection to the validity of an order of the Interstate Commerce Commission that its enforcement might result in discrimination against some other common carrier.

In so far, therefore, as the tap lines assuming the position of common carriers are complaining against an alleged discrimination, they plainly are in no position to complain or raise such question.

Interstate Commerce Commission v. C., R. I. & P. Ry. Co., 218 U. S., 88.

And generally on such a question the finding of the Interstate Commerce Commission involves merely a question of fact not reviewable by the courts.

Interstate Commerce Commission v. D., L. & W. R. R. Co., 220 U. S., 235.

Of course the lumber company would have no standing in court to complain of an order of the Commission or its effect (*Proctor & Gamble v. United States*, 225 U. S., 282), and the lumber company cannot use its tap line to get such standing. But the claim of discrimination against the tap lines or the affiliated mills is ab-

surd. The entire effort of the Commission was to prevent that discrimination which existed in favor of these great shippers. It would be absurd, however, to say that because the Commission attempted to stop the payment to favored shippers of enormous rebates that such favored shippers or their agents the tap lines were being discriminated against by the order.

POINT 5.

Point 5 raised by appellees in the Commerce Court is as follows:

"5. The order deprives the petitioners of their rights under the Constitution of the United States."

It is respectfully suggested, however, that the appellees have no constitutional right to receive a rebate or to commit a crime.

It is claimed by tap lines that the result of the order of the Commission is to deprive them of their property. Of course, petitioners have no right to a rebate, and that is the only "property" they will lose as a result of the order. It is true such rebate was promised by written agreement, but such agreements are, and were when made unlawful.

Strong cases have arisen where contractual rights which were lawful when made afterwards became illegal as in violation of the Act to Regulate Commerce, and this court held the contracts to be illegal.

In *Armour Packing Company v. United States*, 209 U. S., 56, the railroad company had entered into contracts with certain favored shippers, agreeing to maintain a certain rate on certain commodities; subsequently the railroad company, by its published tariffs, increased the rate to the public and continued to fulfill the provisions

of the contract by maintaining the special rates for the favored shippers. In sustaining a conviction and fine this court said (71, 72):

"In this act we find punishment by imprisonment abolished and the shipper and carrier are placed upon the like footing, and it is made unlawful for any person or corporation to offer, grant, solicit, give, or to accept or receive any rebate, concession or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced. And we find the word 'device' disassociated from any such words as 'fraudulent conduct,' 'scheme' or 'contrivance,' but the act seeks to reach all means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received. Had it been the intention of Congress to limit the obtaining of such preferences to fraudulent schemes or devices, or to those operating only by dishonest, underhanded methods, it would have been easy to have so provided in words that would be unmistakable in their meaning. A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be 'that which is devised or formed by design; a contrivance; an invention; a project,' etc. * * *

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

In *Louisville & Nashville Railroad Company v. Mottley*, 219 U. S., 467, it was held that a pass issued by a railroad company to an individual, even though in pursuance of an agreement which was legal at the time it was made, resulted in preferences and discriminations prohibited by the Act to Regulate Commerce. After reviewing numerous authorities on the subject, Mr. Justice Harlan said (p. 478):

"The purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality, except in the case of certain excepted classes to which Mottley and his wife did not belong and which exceptions rested upon peculiar grounds. Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect of the prohibition of free tickets, free passes and free transportation. It solved the question when, without making any exceptions of *existing contracts*, it forbade by broad, explicit words *any* carrier to charge, demand, collect, or receive a 'greater or less or *different* compensation' for *any* services in connection with the transportation of passengers or property than was specified in its published schedules of rates. The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception."

But the tap line rebate agreement was unlawful when made.

POINT 6.

THE COMMODITIES CLAUSE DOES NOT REPEAL THE ACT TO REGULATE COMMERCE.

Counsel for appellees endeavor in Point 6 to show that the Commodities Clause sanctions the practice of rebating. Such sanction is not apparent, but if the Commodities Clause permits rebating and unjust discrimina-

tion it repeals the most important provisions of the Act to Regulate Commerce.

The sixth point made, *i. e.*, that "the order of the Commission expressly over-rides the exception contained in the commodities clause of the Act to Regulate Commerce," was seriously argued and evidently made some sort of impression upon the Commerce Court, and while that court did not go to the extent of saying that the Commodities Clause legalized a rebate, yet such seems to have been the opinion of that court. The Commodities Clause forbids "any railroad company" to transport its own commodity other than timber, in which it has any interest, direct or indirect, from one state to another, unless it is necessary for its business as a common carrier. This provision was simply intended to prevent a railroad company from engaging in interstate commerce at all except as a common carrier because of the opportunities afforded for discriminating against other shippers. This clause, of course, does not repeal any provision of the Interstate Commerce Law on the subject of discriminations or preferences and it was intended thereby not to give a lumber company as a shipper any opportunity to obtain a concession or rebate from the tariff rate or to work a discrimination against other shippers. It certainly did not make the lumber company or its agency, the tap line, a common carrier under the law exempt from the prohibition against rebating which is imposed upon a regular common carrier, nor did it permit a tap line to work a discrimination which it would not permit a regular railroad company to make. There was simply excepted from the general prohibition of the Commodities Clause a railroad company which at the same time was engaged in manufacturing lumber, and merely impliedly permitted such company to carry its

own lumber for commercial purposes. In the tap line cases the situation is reversed and we have the tap line railroad not carrying its own lumber or that in which it is interested, but simply carrying lumber for its principal, the lumber company. But it is not made a common carrier by doing so. Thus reference was made to the case of *United States, etc. v. Delaware & Hudson River Co.*, 213 U. S., 366, which was the first Commodities Clause case. That railroad while originally incorporated under the state law to construct a canal and operate coal mines subsequently became in fact a common carrier by railroad of passengers and property. So far as it was concerned it was estopped from saying that it was not a common carrier or railroad company as long as it carried other property and passengers. Such being the case, it fell within the prohibition of the Commodities Clause. In other words, the Delaware & Hudson Company had been acting as a railroad company by its own profession, so that it was estopped in a proceeding by the Government to deny that it was a common carrier and the very fact that it carried a carload of coal or freight as a common carrier for other parties brought it within the prohibition of the Commodities Clause. The exception of lumber or timber from the prohibition of the Commodities Clause gives no countenance to the claim that thereby other prohibitions in the law as against undue preferences and discriminations and rebating were annulled or weakened.

III.

CASES HERETOFORE RELIED UPON BY APPELLEES.

Appellees heretofore cited the case of *United States v. U. S. Yard & Transit Co.*, 226 U. S., 286, as supporting their contention that the tap lines are common carriers as to their own traffic. That case, however, is easily distinguishable from the case at bar. It is rather in our favor.

The Union Stock Yard & Transit Company was not a shipper nor was it controlled by shippers. It appeared that the Stock Yards Company which originally owned and operated railroad tracks under its charter in connection with stock yards leased the tracks to the Junction Railroad, securing revenue from the business thereon. The stock of the Stock Yards Company and of the Junction Railroad was held and controlled by a holding company, which, of course, indirectly controlled both of the subsidiary companies. The Stock Yards Company attempted, under contract with one Pfaelzer, to give him a bonus for locating upon the tracks of the Junction Company, in consideration of his shipping over the same and patronizing the Stock Yards. The Stock Yards were unquestionably a facility of the various railroad companies used by them for the receipt and delivery of cattle transported. The court held that the proposed donation by the Stock Yards Company while claiming not to be a common carrier was nevertheless in the nature of a concession and a discrimination prohibited by the Interstate Commerce Law and the Elkins Amendment thereto. The court referred to the common control of the Stock Yards Company and the Junction Railroad being by the same interest, that is, the holding company, and the fact that

the Stock Yards Company under its lease was interested in the receipts of the Junction Railroad. Therefore, it was held that, in substance and effect, the Stock Yards Company and the Junction Railroad were common carriers and that *it was unlawful for the same interests, through the instrumentality of the Stock Yards Company, to offer such a concession to a shipper.*

In other words, the court looked through the corporate fiction to the actual control of both companies and disregarded the technicality of the separate legal corporate entities. It is contended from that case, however, that the petitioning lumber companies or tap lines are also common carriers to the extent that they furnished under lease or through stock ownership rails or other instrumentalities of interstate transportation. Such contention merely is that any shipper who furnishes any instrumentality for interstate transportation even though wholly for his own benefit or use becomes a common carrier. If that is so then every industry owning its own tracks becomes a common carrier with the right to participate in and make through rates upon its own commodities and secure such division as the trunk line or regular railroad company is willing to give; for until parties to a joint rate disagree the Commission is without power or jurisdiction to fix the division.

In *United States v. B. & O. R. R. Co.*, 231 U. S., 274, generally known as the "Lighterage Case," the trunk line railroads, extending from the west to the New Jersey shore of the Hudson river and requiring facilities for the receipt and delivery of freight upon Manhattan Island, made a contract with Arbuckle Bros. the latter contracting and doing business under the name of the "Terminal Company," for the use of facilities known as the "Jay Street Terminal," and which was made and es-

established as a public depot for the receipt and delivery of freight generally, and also for use of lighters and the services of the Terminal Company in lightering freight between the railroad terminals on the New Jersey shore and the Jay Street terminal in New York. An allowance of a certain amount per ton was made to Arbuckle Bros. on all freight using the terminal and which was lightered both to and from the New Jersey shore. Arbuckle Bros. were located adjacent to the Jay Street terminal, but it was in fact used for receipt and delivery of all kinds of freight and the freight (sugar) of Arbuckle Bros. was but one-third of the actual tonnage handled. The trunk line railroads extended rates applicable to the New Jersey shore over to the Jay Street terminal in New York. The Federal Sugar Refining Company, which was located at Yonkers and outside of this lighterage district, complained that it was not given the same allowance that was thus made to Arbuckle Bros. although steamers carrying their sugar from Yonkers touched Pier 24, which was within the lighterage district, and was then carried to the New Jersey terminals of the trunk lines. The Commission had held in an earlier hearing that the free lighterage arrangements theretofore made by the trunk lines were the only available means by which they could extend their lines to New York and were not forbidden by the Commerce Act. Neither were they obliged to extend the free lighterage district. It also ruled that the service rendered by Arbuckle Bros. in the lighterage of their own sugar from the Jay Street terminal to the Jersey shore was a service in the aid of transportation, and that the allowance, under the contracts, was not unreasonable. Nevertheless on the second complaint of the Federal Sugar Refining Company, while the Commission did not

forbid the allowance to Arbuckle Bros. as in itself illegal or unreasonable it forbade it only as being discriminatory unless a like allowance was made to the Federal Sugar Refining Company. In this respect it was held that the Commission erred because owing to difference in location of these two shippers, as well as the other conditions, there was no undue discrimination; that under the contract with the terminal company the railroad companies had extended their lines of road as to the public generally to the Jay Street terminal and were at liberty to perform the transportation service themselves or to permit Arbuckle Bros. to do it for them for a reasonable allowance. On the other hand, the railroad companies not having extended by lease or otherwise their lines to the docks of the Federal Sugar Refining Company they were under no obligations to the public to transport to or from there and, therefore, under no obligations to make any allowance to the Federal Sugar Refining Company; that the lighterage service performed by the Federal Sugar Refining Company was for its own convenience for which the railroads were under no obligation to make compensation. There was no evidence whatever that the selection of the premises of Arbuckle Bros. was for the purpose of giving them, as large nearby shippers, any preference or undue discrimination against competing sugar refineries. The court also found that the contract governing the Jay Street terminal and lighterage service was made in good faith and not as a cover for any fraudulent scheme to give rebates or any other legal advantage. As the order of the Commission was in the alternative the court concluded that the Commission found nothing unlawful *per se* in the compensation paid to Arbuckle Bros. under the contract, although compensated upon the gross tonnage

which included their own sugar for the order sanctioned the continuance of the practice upon condition that a like allowance should be paid upon the sugar lightered by the Federal Sugar Refining Company. It thus appeared that both the Commission and the courts concluded that under the contracts the trunk lines had secured the use of Arbuckle Bros.' property and made them public terminals thereby extending their lines to that point the same as though they had leased or purchased such terminals, and that as they had also extended their tariff rate to that point they were obligated as common carriers to carry to and from such point. We do not believe, however, that it was intended to be held that the mere extension of a tariff rate by a trunk line to a private mill located upon its own tracks and which could be utilized only by such mill would amount in law to an extension of the trunk line railroad so as to give such private mill or lumber company a right to a division of that rate for services it might perform for itself in the way of switching its own freight to and from the trunk line. Such a holding would afford too easy an opportunity to the trunk line to favor any lumber company it might choose, and thus unduly discriminate against others whom it did not choose to favor. It would have to be determined whether, as a matter of law as well as of fact, the trunk line railroad had really extended its line to include points upon the rails of the lumber company so that it would be obligated to operate such part in connection with its trunk line as a carrier of freight of all parties to and from such points.

As to the Peavey Elevator Case, 222 U. S., 42, it is sufficient to say that the allowance made by the Union Pacific Railroad Company to the Elevator Company upon all grain passing through the elevator, including

that of Peavey & Company, was an allowance which the Commission found to be reasonable in itself, and was for a service which the railroad company, under Section 1, was obliged to furnish, namely, elevation and transfer in transit. In so far as the railroad company did not make the same allowance to other elevator companies performing the same service in the same locality it was held guilty of undue discrimination. See:

Union Pacific Railroad Co. v. Updyke, 222 U. S., 215.

But in this case the trunk lines were not obliged to receive or deliver freight beyond their own established depots and were not obliged, as a matter of law, to receive or deliver at the mills of the lumber company located upon the tap lines, and we do not think, therefore, that any allowance could be made either to the lumber company or its agency the tap line for performing services for the lumber company in getting its own freight to and from the trunk line.

IV.

THE DECISION OF THE COMMERCE COURT COMMENTED UPON.

The decision of the Commerce Court in these cases is reported in 209 Fed., 244, *et seq.*

In this decision it seems quite plain that the Commerce Court appreciated the following facts:

1. That the situation before the Commission in its investigation was one revealing the grossest discrimination.
2. That the allowances made by the trunk line carriers to the tap lines were rebates.
3. That the tap lines were mere plant facilities as to

their proprietary companies, and that the services rendered were mere plant services.

4. That the Commission had power, first, to discover whether there had been any violation of the law; and second, to make an order which would prevent such violation.

5. That the situation imperatively called for correction.

And yet notwithstanding all of this the Commerce Court set aside the order of the Commission as being unlawful, not upon anything expressly found by the Commission, but, on the contrary, by something which the Commerce Court claimed the Commission must have impliedly held, although the Commission expressly held the contrary.

Thus the Commerce Court said, on page 249:

"The evidence before the Commission tending to show that the petitioning tap lines were originally constructed as mere plant facilities to serve only the proprietary interests, that the latter owned or through common ownership in whole or in large part controlled them, that the later incorporation was primarily in order to secure rebates, that the incorporation of only a part of the logging road was a device to retain a monopoly, that the traffic other than that of the proprietary mills was negligible in quantity and merely incidental, that the trunk lines and their branches could be compelled to render such service and at such rates as would make it unnecessary to employ the tap lines as common carriers, as well as the evidence of many other facts on which the Commission in its report and counsel in argument and briefs lay much stress, might have justified the Commission in finding that these tap lines were not in fact *bona fide* common carriers."

On page 250 the Commerce Court said:

"If, then, the Commission was justified in finding

that these interstate common carriers, the petitioning tap lines, were mere plant facilities as to their proprietary companies, and that the services rendered by them in hauling logs to and lumber from the proprietary mills were merely the plant services of plant facilities, its order forbidding any division or allowance therefor would be valid and proper."

And yet that is exactly what the Interstate Commerce Commission did hold in the case in question.

On page 250 the Commerce Court concedes that a railroad might be as to proprietary shippers a mere plant facility, although performing common carrier's services for others (following its own decision in *Crane Iron Works v. United States*, 209 Fed., 238), and it concedes the power in the Interstate Commerce Commission to prohibit the payment for such plant-facility service.

On page 251 the Commerce Court said:

"The important questions, therefore, to be considered by this court are:

First. Whether the Commission acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be acting as a mere plant-facility of and performing mere plant service for the proprietary companies. Or,

Second. Whether in each of these cases there was substantial evidence to justify the ultimate findings and the consequent order of the Commission; not whether this court would have drawn the same conclusion from conflicting evidence; not whether, in the judgment of this court, it is expedient or inexpedient to encourage the building of these tap lines by the large lumber interests of the southwest, but solely whether in the evidence before it there can be found a substantial basis for the Commission's conclusions."

The Commerce Court on page 252 began a consideration of the above questions. It said:

"We come, then, to a consideration of the main questions: Was there, as to each of these petitioning tap lines, substantial evidence to justify the findings of the Commission? Did the Commission differentiate the several companies arbitrarily on distinctions or differences not justifiable in law? While evidence was given as to each road separately and specifically, and while the report deals with each road separately, a considerable mass of testimony and a considerable portion of the reports cover the entire situation. It is apparent therefrom that very real evils existed, evils demanding correction.

Tap lines, in many instances, were receiving amounts entirely disproportionate to the services rendered by them; amounts based, not upon the cost or value of the services rendered, if they were transportation services, but upon other and totally illegal considerations. Such payments were, in a large measure at least, secret rebates, and to that extent unlawful. Many tap lines received no allowances for work practically identical with that performed by other lines to which most liberal allowances were given. Moreover, while prior to 1906 divisions and allowances, especially in the form of secret rebates, were made directly to the mills, after the amendment of 1906 the test of the right to receive them, as fixed by the trunk lines, was incorporation of the tap line as a common carrier, although it is clear that incorporation is not essential to the status of an interstate common carrier.

The power of the Commission to prevent such rebates and unjust discriminations is beyond question."

The Commerce Court, after admitting the existence of such a serious situation and after stating that the power of the Commission to prevent such rebates and such unjust discrimination is beyond question, then makes the following remarkable statement on page 253:

"It is to be accomplished, however, not by enjoining payments, which the law itself recognizes as legal,

but by requiring equality of treatment and by regulating the sums to be paid, so that they will be fairly proportioned to the services rendered. That the Commission is not authorized to forbid lawful payments merely because, in its judgment, unjust discriminations result therefrom, or to declare that to be unjust discrimination which results only from a perfectly lawful payment, is apparent from the case of *I. C. C. v. Diffenbaugh*, 222 U. S., 42, 32 Sup. C., 22, 56 L. Ed., 83. The invalidity of the Commission's finding, when unsupported by the evidence, that certain services are plant facility and not transportation services, is also attested by the same case."

But there was no finding by the Commerce Court that the evidence did not support the findings of the Commission. On the contrary, it seems to have conceded throughout the case that the discriminations, rebates and facts were as found by the Commission.

The Updike case and the Diffenbaugh case cited by the court in support of its conclusion are not at all pertinent to the controversy in question.

On page 257 the court calls attention to the case of *Crane Iron Works v. United States*, 209 Fed., 238, and then utterly ignoring the doctrine there laid down, proceeds to advance the view that so long as the logs or lumber are in any way "transported" on rails a division of a through rate is lawful although it would be unlawful if paid to a shipper. This reasoning, of course, leads to the absurd proposition that the services of a common carrier are not confined to its rails but that anyone can compel a common carrier to leave its own rails and go after his goods.

The Commerce Court never reached a consideration of the second question which it asked itself, but stopped at the end of the first by saying on page 258:

"In view of our conclusions as to the arbitrary character of the distinctions on which the order of

the Commission is based, it becomes unnecessary for us to consider the evidence as to each petitioning tap line separately."

After thus destroying in a sentence the work which had taken the Commission years to perform the court goes on to say on page 259:

"The Commission is, of course, fully empowered to regulate the amount of allowances and divisions so as to prevent rebates and unjust discriminations. In this way, as well as by the prohibition of or prosecution for certain illegal practices mentioned in the report, whereby proprietary mills obtain undue advantages, most of the evils, which the Commission has sought by its order to prevent, will be checked. But such as are inherent in the common ownership of industrial and common carrier transportation facilities do not constitute legal wrongs and must remain unless and until Congress shall extend the scope of the commodities clause."

Although the Commission expressly found that the tap lines were not common carriers of the traffic in question, the Commerce Court seems to hold that the Commission impliedly held that they were common carriers.

It is idle, however, to say that if these tap lines be given the status of common carriers the Commission can in any way correct the intolerable situation revealed by the record. If these tap lines are declared to be common carriers of the traffic in question the old situation will be immediately resumed. As a matter of fact this whole proceeding is a crafty attempt on the part of the tap lines to have themselves declared common carriers.

The tap lines have never remained in a definite position in this case. They have always started by arguing that they are common carriers and as such are entitled to any division of a freight rate which they are able to obtain from a trunk line; and yet when counsel were asked to state whether a tap line had a right to obtain

7c per hundred pounds for hauling a few feet when the trunk line obtained only 7c for hauling several hundred miles they have always stated that they must confess that some grave abuses have existed in the general situation and that the Commission had ample power to wipe out the same. Of course the truth is that if these tap lines are given the status of common carriers of the traffic of their principals, the sawmills, they will be free to make any division they see fit. Under Section 15 of the Interstate Commerce Law the Commission may establish through routes and joint rates "and may prescribe the divisions of such rates *as hereinbefore provided* and the terms and conditions under which such through routes shall be operated, *whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates.*"

In a preceding part of Section 15 the Commission is given the power to change joint rates where found to be excessive or discriminatory, and it is then provided:

"Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, *shall fail to agree among themselves upon the apportionment or division thereof*, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order."

It is obvious from this that the power and jurisdiction of the Commission in respect to fixing divisions of a joint rate does not arise until the carriers shall have failed to agree upon the same.

It is very plain from the language that the power of the Commission to fix the division of a freight rate is predicated upon the failure or refusal of the carriers themselves to make the apportionment or divi-

sion of the rate. The purpose of the provision was manifest. If the carriers could not voluntarily agree upon the amount of compensation each was to receive, they were entitled then to a hearing before the Commission to have the compensation of each party determined and fixed. But if they voluntarily agreed upon the amounts there would be no occasion or justification for the Commission to act in fixing a division. After such failure or refusal the Commission may make a supplemental order prescribing the division. In the event, therefore, that these tap lines are held to be common carriers it is very plain that the power and jurisdiction of the Commission to prescribe a division of joint rates will not arise unless the carriers parties thereto shall fail to agree upon the division. The history of this case, however, plainly shows that there will be no refusal or failure to agree between the trunk lines and the favored tap lines. As a matter of fact in the petition in the Commerce Court two of the appellees herein sought specific performance of contracts providing for a division of the freight rate. In those instances the agreement has already been made as to the divisions, so that if it is held that the two appellees in question are common carriers the old situation which the Commission attempted to remedy will be at once resumed. Moreover, it is difficult to find a case in the general situation where contracts have not been entered into providing for a division of the rates.

CONCLUSION.

The last analysis of the case is that an abuse prevalent for years was attempted to be corrected by the Commission, under jurisdiction and power which all concede. Proceeding in a logical way, the Commission held that the tap line as to traffic of its proprietary mill was not a

common carrier, but was a mere agency of the mill in performing a service which the shipper and not the trunk line company must perform, and for which service any allowance out of the joint through rate would be unlawful.

Realizing the great power of shippers who control immense traffic to compel trunk lines to make rebates in order to obtain such traffic, the Commission ordered the trunk line railroads to cease from further paying such rebates.

The Act to Regulate Commerce plainly forbids rebating and discrimination, and plainly gives the Interstate Commerce Commission power to prevent it, and the investigation and order of the Interstate Commerce Commission was in pursuance of such power and duty.

But the Commerce Court, admitting the evil and conceding the necessity for stopping it, set this order aside upon a theory diametrically opposite to its opinion in the case of *Crane Iron Works v. United States*, 209 Fed., 238, and without any suggestion as to how the desired end could be accomplished.

It will be as strange a thing as ever happened in the history of this nation if large and favored shippers by the mere device of incorporation and the laying of 50 feet of railroad track can secure from trunk lines enormous and discriminating rebates from the lawfully published tariff rate; and if there is no way of stopping such an abuse then the Interstate Commerce Law has been repealed.

That is the real point in this case.

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JAMES L. COLEMAN,
Solicitors for Appellants.

CHICAGO, March 7, 1914.

TAP-LINE CASES.

Office Supreme Court, U.

FILED

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Supreme Court of the United States.JAMES D. MAHER
CLERK

OCTOBER TERM, A. D. 1913.

UNITED STATES,
vs.
LOUISIANA & PACIFIC RAILWAY COMPANY et al.,
Appellant,
Appellees. } No. 829.

UNITED STATES,
vs.
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ON APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR APPELLEES.

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
FOR APPELLEES.

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ON APPEAL FROM THE UNITED STATES COMMERCE COURT.		

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

This case comes here on appeal from a decree of the Commerce Court enjoining an order of the Interstate Commerce Commission forbidding certain railroad companies therein named from publishing and maintaining in connection with the appellee railroads, joint rates upon lumber and other forest products from points of origin on the lines of railroad operated by the appellees, to various points of destination in other states of the United States. Inasmuch as the Commerce Court disposed of the questions involved in all four cases in a single opinion we shall discuss the issues involved in all eight appeals in a single brief.

HISTORY OF THE CASE.

Early in 1908 the Interstate Commerce Commission, in pursuance of formal complaints entered upon a hearing and investigation in what is known as the *Star Grain & Lumber* case. The opinion and report thereon is published in 14 I. C. C. 364. Thereafter the case was reopened, and upon further hearing a supplemental report was published, 17 I. C. C. 338. No order was made in either proceeding, the Commission's conclusions being announced as abstract propositions of law, and involved the lawfulness of practices in the southwest yellow pine producing section arising out of the common or affiliated ownership of railroads and lumber companies. This ownership took various forms, the following

three being the most common: (a) Common stockholders in identical proportions in both the lumber and the railroad company; (b) majority stockholders in one company being the sole owner of the stock in the other; (c) ownership of stock in one company by the other company, stock being held by trustees.

In practically all instances the railroad company was a corporation organized and existing under the laws of the state as a common carrier with all the liabilities and rights prescribed by the common law or state regulations, statutory or constitutional. Rates on yellow pine lumber from the producing section to the consuming territory were published as joint through rates and to any given point, were identical from all points of origin in the territory south of the Arkansas River and west of the Mississippi River. That is to say, a blanket rate applied over all the producing territory. The railroad company serving a particular mill with common or affiliated ownership had become party to the joint rate and by agreement this joint rate was divided between the originating carrier and successive carriers to destination. The portion of the rate earned by each carrier was technically known as a division of the joint through rate. In the two reports and opinions above referred to, the Interstate Commerce Commission announced that joint rates could not be maintained between railroad companies unless all such companies were *bona fide* common carriers. The legal questions involved were important and of far reaching consequence. Under the threat of criminal prosecution the trunk line carriers (by trunk line is meant all those carriers other than the orig-

inating carriers owned by or affiliated with the lumber producing companies) filed with the Commission in August and September, 1910, tariffs canceling the joint rates upon forest products then applying from the yellow pine producing section to interstate points of destination. The result of these canceling tariffs was to put in effect from mills located upon the originating short line railroads a combination of rates so that, for example, a mill located just south of the Arkansas River 10 miles out on one of the short line roads, would be compelled to pay the local charge of that railroad to the junction point of the trunk line, such local charge averaging about five cents per 100 pounds, and in addition the blanket rate from the junction point, while a mill located in South Louisiana on a trunk line railroad several hundred miles further from the consuming market would pay only the blanket rate, or five cents less than the mill located on the tap-line just south of the Arkansas River. It is thus apparent that this cancelation of joint rates increased the revenue of the trunk line railroads by the portion of the joint rate theretofore earned by and paid to the originating carrier, and subjected the mill owner on the short line road to the payment of largely increased charges.

Upon petition the Interstate Commerce Commission suspended the tariffs canceling said joint rates and instituted an investigation upon its own motion. The joint rates remained in effect until April 30, 1912. The Commission announced its conclusions in two reports, the original being published in 23 I. C. C., pages 277 to 344, and supplemental report a few days later, published in the same volume, pages 549 to 651.

An examination of the Commission's order of May 14, 1912, which was the original order in the case, discloses that as to each of the four railroad companies, appellees herein, the Commission found that no transportation service was being performed upon the forest products owned or produced by the affiliated lumber companies, appellees herein, the exact finding in respect to this matter being

The service performed for the respective proprietary lumber companies in moving the logs from their respective forests to their respective mills and in moving the product from the mills to the trunk lines is not a service of transportation by a common carrier railroad and that any allowances or divisions out of the rate on account thereof are unlawful.

Thereafter suits were filed in the Commerce Court by certain of the appellees herein, praying for an injunction against the said order. The Commerce Court, however, following the Proctor & Gamble decision, 225 U. S. 282, dismissed the petitions. Thereupon appellees herein filed a petition with the Interstate Commerce Commission for an amendment to the order to obviate the defect in the order of May 14th, above quoted. Thereupon the Commission issued its amended order of October 30, 1912, which amended the finding above set forth so as to read as follows:

That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk line is not a service of transportation by a com-

mon carrier railroad, but is a plant service by a plant facility and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations as found in the said reports.

The amended order then further proceeded to name the trunk line connections of the appellees herein and ordered that they

be, and they are hereby, notified and required to cease and desist and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above named parties to the record in respect of any such above described service.

It is further provided in the said order:

That in case of the failure of the principal defendants (the trunk lines) to re-establish, on or before January 1, 1913, the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of the respective proprietary companies the Commission will upon appropriate petition herein enter an order requiring the establishment of such through routes and joint rates or enter upon an inquiry with respect thereto.

It thus appears that by its amended order the Commission added to its original order a finding that the tracks and equipment of the appellees herein were plant facilities of the appellee lumber companies; that the service performed by the appellee railroads upon the proprietary traffic was a plant service by a plant facility and that any allowances or divisions out of the joint rate on the traffic of the appellee lumber companies resulted in undue and unreasonable preferences and unjust discrimination.

The order further announced the intention of the Commission to require joint rates upon the forest products of all lumber companies other than appellees herein. This amended order was made upon the same record as the original order. The Commerce Court, after hearing additional evidence before the Commission, announced its opinion November 26, 1913, 209 Fed. 247.

In the unanimous opinion of the court the conclusion was reached that the Commission had erred in its order so far as the appellees herein are concerned and enjoined the order. Briefly stated, the Commerce Court reached the conclusion that the distinctions drawn by the Commission were arbitrary and without justification as a matter of law; that since the Commission had found that the appellee railroads were common carriers of traffic owned by other than the proprietary interests, and since a similar service was performed for the appellee lumber companies, it followed that the railroad companies were common carriers of all traffic so transported. The Commerce Court said:

The actual service in transporting logs to or lumber from the proprietary mills in no respect differs from that performed for independent mills; the carriage over the tap line ranges from a short switch to a many-mile haul; its purpose, so far as the lumber is concerned, is not to serve the industry in its internal operations, but directly to serve both the mill, as shipper, and the general consuming public, as consignees and purchasers. When these tap lines, which it must again be emphasized, are not private carriers, but are admittedly for some purposes interstate common carriers, take the carloads of finished lumber at the mills for the purpose of either

hauling or switching them to a trunk line so that they may reach their ultimate destination beyond the state, the interstate transportation has actually begun.

As to the logs, the conditions, while not identical, are not dissimilar. The hauling, it is true, is primarily for the benefit of the mill; consignee and consignor are one. If the service had continued to be what it originally was in most of these cases, by a private carrier for the one industry alone or from the forests to the directly adjacent mills, forest and mill being in fact one entire plant, so that the haul was inter-industrial, it might well be held to be a plant-facility service (*Kaul Lumber Co. v. C. of G. Ry. Co.*, 20 I. C. C. 450, 455); but as Prouty, C., says in that case:

"The thing done is properly the function of a common carrier and not necessarily of a plant facility. Great quantities of logs are transported to mills for manufacture by railroads as common carriers under published tariffs."

The Commission might have limited the blanket rate to the lumber either directly or by forbidding milling in transit. This, however, was not done. On the contrary, the order directing re-establishment of the old rates as to non-proprietary mills sanctioned the extension of the blanket rates not only to the mill, but back to the forests with the milling in transit privilege. That applied to each of the petitioning tap lines and is in itself a recognition of their status as interstate common carriers not only of lumber but also of logs.

Again, it is immaterial that in an early stage of the industry or in small plants logs are hauled to and lumber from the mills by horse and wagon and not by railroad. When this is the method of bringing the goods to the trunk line the allowance may or should be forbidden not because of the nature of the service—clearly it is transportation when performed by a com-

mon carrier expressman—but because of the means used to perform it. The allowance to be made by a trunk line under Section 15, and the payment of which cannot be forbidden (*I. C. C. v. Diffenbaugh, supra*), is only for a service that is a part of or for an instrumentality to be used in the transportation which the trunk line would otherwise be compelled to perform, not for a service which is neither part of nor directly connected with the trunk line's transportation even though it be transportation in its relation to the industry.

The fact that these tap lines connect directly with the private logging roads of the proprietary mills; that the latter alone run into the forests; that the point at which the common carrier service begins is more or less arbitrarily determined solely in the interest of the proprietary mills; that other mills must haul their logs by team to the tap line or must purchase them in the open market, and that thereby these proprietary mills have great commercial advantages over their competitors does not in any manner affect the matters now before us. As the Supreme Court has said in the *Diffenbaugh* case, *supra*:

“The law does not attempt to equalize fortune, opportunities or abilities.”

As the actual service rendered by the tap line from the time it takes the logs until it delivers the finished product to the trunk line is the same for proprietary and non-proprietary mills, and as this is held to be a transportation service by an interstate common carrier as to the latter, it must be held to be a similar service as to the former.

In view of our conclusions as to the arbitrary character of the distinctions on which the order of the Commission is based, it becomes unnecessary for us to consider the evidence as to each petitioning tap line separately.

The Atchison, Topeka & Santa Fe Railroad Company, appellant herein, was an intervenor in the Commerce Court, in support of the validity of the Commission's order. We shall later have occasion to point out the interest of the Santa Fe in this case.

Whether or not the opinion of the Commerce Court correctly states the law is not the primary question herein. If there is any sufficient basis for the decree of the Commerce Court it must be affirmed.

The Commission was without power or authority to make the order complained of for the following reasons:

1. *The service performed by each of the appellee railroads herein is a service of transportation by a common carrier railroad within the meaning of the Act to Regulate Commerce.*

2. *The appellee railroads are not plant facilities and do not perform a plant facility service for the appellee lumber companies herein.*

3. *There was no evidence upon which the Commission could base its finding that the participation by the appellee railroads in joint rates upon the logs and lumber of the appellee lumber companies constitute an undue and unreasonable preference or subjects any party to unjust discrimination within the meaning of the Act to Regulate Commerce.*

4. *The Commission's order results in undue and unreasonable preference and unjust discrimination within the meaning of the Act to Regulate Commerce.*

(a) *As between common carriers subject to the Act to Regulate Commerce.*

(b) *As between shippers.*

5. *The order deprives the appellees of their rights under the Constitution of the United States.*

6. *The order of the Commission expressly overrides the exception contained in the commodities clause of the Act to Regulate Commerce.*

ARGUMENT.

I.

THE SERVICE PERFORMED BY EACH OF THE APPELLEE RAILROADS HEREIN IS A SERVICE OF TRANSPORTATION BY A COMMON CARRIER RAILROAD WITHIN THE MEANING OF THE ACT TO REGULATE COMMERCE.

The Commission's original tap line report, 23 I. C. C. 277, discloses the Commission's views on the questions involved. While in the syllabus of the opinion the Commission disclaims making common ownership of the industry and short line railroad serving it the test as to whether or not the short line railroad is a common carrier, we are unable to find any rule laid down in the opinion by the application of which to the facts as to any particular short line railroad it may be ascertained whether the railroad falls in the category of "plant facility" or should be recognized as a common carrier with all the rights thereunto belonging. In the original opinion, 23 I. C. C. 277 to 344, the Commission passed upon the status of some 34 short line railroads, all of which were held by the Commission not to be performing a service of transportation as a common carrier for the proprietary lumber companies. Since the decision of the Commission in the Tap-Line case, it has dismissed certain of the tap-lines from the proceeding on a showing made that there had been a divorce

of ownership and complete severance of stockholders as between the railroad and the lumber company. So that we think it plain that if there had been no common ownership or common stockholders the Commission would have had no difficulty in reaching the conclusion that each of the appellee railroads was performing a service of transportation as a common carrier of all traffic handled. In other words, while the Commission disclaims common ownership as the test, nevertheless but for that common ownership there would have been no condemnation of the railroad and its participation in joint rates would not have been declared unlawful.

The Commission's views as to the plant facility service is summed up in its opinion as follows:

It is clear, then, that appliances that are generally regarded by the lumber interests themselves not only as mere plant facilities, but as necessary facilities in the successful conduct of their investments, cannot reasonably be held to become the transportation facilities of a common carrier merely because a lumber company has incorporated a small railroad company and turned the facilities over to it. There must be something more substantial than a mere manipulation of the situation in order to change the real relation of these facilities to the industry. As with the movement of lumber from the mill, so with the movement of the logs to the mill, we must necessarily hold that it is an industrial service pure and simple, except when performed for the lumber company over the rails and with the power and equipment of a tap line that is a common carrier not in form only but in fact as well. And here, again, we find it impossible to lay down any general rule or principle by which in all cases it may be determined whether the

movement of logs from the forest to the mill is transportation under the act or merely an industrial service.

The law of the case must be found primarily in the Act to Regulate Commerce with its various amendments and supplements. The congressional intent is clearly set forth in Section 1 of the Act to Regulate Commerce, as amended June 18, 1910. The section first names the entities subject to the act. Among others these are "any common carrier or carriers engaged in the transportation of passengers or property, wholly by railroad" from one state to another state of the United States. Congress then, in the same section, defines the term "transportation" and the term "railroad." The term "transportation" is specifically defined as including

cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported;

By the same section the term "railroad" is defined as including

all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property.

These statutory definitions, together with the ordinary dictionary interpretation, must determine the application of the Act to Regulate Commerce. The Commission has already held, and rightly, that since the act did not define the term "common carrier," the Commission must look to the common law for the definition.

Manufacturers Ry. Co. v. St. Louis, Iron Mountain & Southern Ry., 21 I. C. C. 304, 312.

So that under the Commission's interpretation of the act, wherever at common law, upon a given state of facts, the relation of common carrier existed, that same state of facts would constitute a common carrier under the Act to Regulate Commerce. Congress intended to apply the restrictions, duties and liabilities under the Act to Regulate Commerce to all common carriers transporting property from one state to another by railroad. The language of the act is specific. The railroad over which the transportation or handling must be performed need not be owned by the common carrier. If it be operated under a contract, agreement or lease it becomes part of the highway subject to the act. Terminal facilities, all the track, the depots, the yards, and grounds used in the transportation or delivery of any property are subject to the statute. Numerous services, such as elevation, transfer in transit, ventilation, refrigeration or storage are included within the term "transportation." It is apparent that Congress intended to reach every service performed for the shipper from the time when the carrier took possession of the property until that property reached

its final destination and was delivered to the consignee. Congress expressly waived ownership as any test in determining the application of the statute by its use of the phrase "irrespective of ownership." Where Congress desired ownership to enter as a test in determining the application of the broad principles announced by the act it used specific language. In the amendment of 1906, known as the Commodities Clause, Congress made it unlawful for a railroad company to transport property owned by it, manufactured by it, mined by it, or produced by it or under its authority after May 1, 1908. We shall later discuss this clause in the act more in detail. It is sufficient here to say that so far as ownership is prescribed as a test, that clause does not apply to the appellee railroads because timber and the manufactured products thereof are expressly exempted from the prohibition of the statute.

In the case of *Columbia Conduit Company v. Commonwealth*, 90 Pa. St. 307, the Supreme Court of Pennsylvania construed the Act of the Pennsylvania Legislature of 1874, requiring *transportation companies* to pay an annual tax based upon capital stock of the company. It was contended by the Columbia Conduit Company, an ordinary pipe line corporation, that it was not engaged in transportation, in moving its own oil through the pipe line. The question to be determined was whether the corporation so handling petroleum through its own pipe lines was a transportation company. The court held that in addition to the provision of the act authorizing the laying down of pipes, tubing, etc., "to transport petroleum" and in the fourth section of the act, in

speaking of the companies to be taxed among others provided "or device for the transportation of freight or passengers." The court said:

"We cannot doubt that this is a company engaged in the transportation of freight within the act of assembly."

This court, in the case of *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 196, defined the term transportation as follows:

Transportation implies the taking up of persons or property at some point and putting them down at another.

Whether upon the facts shown of record the appellee railroads are common carriers is a matter for judicial determination. For the convenience of the court, and at the risk of prolixity, we set forth various decisions of the highest courts of the States of Missouri, Montana, Oregon, California, Minnesota, New Jersey, Maine, Louisiana, Texas and Kentucky, in which citations are given to numerous other state decisions.

In the case of *Kansas & Texas Coal Railway Company v. North Western Coal Company*, 161 Mo. 288, 61 S. W. 864, the Supreme Court of Missouri passed upon the status of the Missouri & Louisiana Railway, one of the tap-lines considered by the Commission in its tap-line opinion, and held that the real test was not stock ownership, length of line of railway or kind of tonnage handled for the controlling interest, but the real test was the existence of the right to haul for the public; that determined the public character of the enterprise. We quote from that opinion as follows:

If, as it is conceded, the plaintiff is a regularly organized railroad company, and its charter and rights cannot be questioned except by quo warranto, it is difficult to understand how the courts in a proceeding of this character can hear evidence as to whether the officers, directors or stockholders of the plaintiff company are the same as those of the Kansas & Texas Coal Company, or whether the coal company loaned the plaintiff company \$70,000, or any other sum; for if all this be conceded, it would avail nothing in this case, unless the rights inherent to and expressly granted to, a railroad company, could be inquired into and taken away from such a company in a collateral proceeding. *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq., Loc. cit. 755-760. But, aside from this, the contention is untenable. There is nothing in the letter or spirit of the law which prohibits the same persons from forming and conducting two or more different corporations, one a business and the other a railroad company. Neither is there any prohibition in the law against a railroad company borrowing money on bonds secured by mortgage on its property, to build and operate its road from a business corporation, rather than from a bank, a trust company, or an individual.

The second contention is equally untenable. The charter of the plaintiff and the laws of this state expressly require the plaintiff to transport persons and freight, and the plaintiff can be compelled by mandamus to do so, if it refuses. The fact that almost the entire volume of business now in sight for the plaintiff to do will be the transportation of coal produced by the Kansas & Texas Coal Company, does not destroy the character of the plaintiff as a railroad company, nor convert it into a private and not a public railroad, nor does it make the use to which the land sought to be condemned is to be applied any the less a railroad right-of-way, and therefore a

public use. So long as the company holds its charter, it speaks in the name of the state when it comes into court and asks to condemn land for a railroad right-of-way, and it would be intolerable that, whenever it seeks to exercise the extraordinary power by this summary process, the courts should stop to inquire into the character, or regularity, or legality, of its organization, or into the motives of the incorporators, or their relations to, or holdings in, other corporations of a different character. The law is settled in this and other states that the use of land for railroad tracks is a public use. *St. Louis, H. & C. K. R'y Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 438; *Dietrich v. Murdock*, 42 Mo. 279; *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Railroad Co. v. Moss*, 23 Cal., loc. cit. 328; *Colorado E. R'y Co. v. Union Pac. R'y Co.* (C. C.), 41 Fed. 293; *DeCamp v. Railroad Co.*, 47 N. J. Law, 44; *Railroad Co. v. Petty* (Ark.), 21 S. W. 884; *Arkansas & O. R. Co. v. St. Louis & S. F. R. Co.* (C. C.), 103 Fed. 747.

So that while it is true that the Constitution (Section 20, Art. 2) provides "that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and, as such, judicially determined, without regard to any legislative assertion, that the use is public"; it is also true that it has been judicially determined that the use of land for a railroad right-of-way is a public use, and not a mere private use. * * *

This case is not without precedent in the law, and all of the defenses that are made here have been made and held insufficient in other cases. A reference to a few will suffice: *Dietrich v. Murdock*, 42 Mo. 279; *Railroad Co. v. Moss*, 23 Cal. 323; *Colo. E. R'y Co. v. Union Pac. R. Co.* (C. C.), 41 Fed. 293; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Powers v. R'y Co.*, 33 O. St. 429; *B., A. & P. R. Co. v. Mont. Un. R. Co.* (Mont.), 41 Pac. 232, 31

L. R. A. 298; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *DeCamp v. R. Co.*, 47 N. J. Law, 44; *Mining Co. v. Seawell*, 11 Nev. 394; *Mining Co. v. Corcoran*, 15 Nev. 147; *Boyd v. Negley*, 40 Pa. 377; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659.

The cases * * * are in all essential particulars similar to the case at bar. They were cases where an existing railroad was endeavoring to condemn a right-of-way for a railroad that would reach coal or mineral mines, and transport the products thereof to the markets, or where a new railroad company, organized practically for that purpose, was seeking to do the same thing. In *Dietrich v. Murdock, Railroad Co. v. Moss*, Colo. E. R'y Co. v. *Union Pac. R. Co.*, *New Central Coal Co. v. George's Creek Coal & Iron Co.*, and *Powers v. Railway Co.*, the same persons owned the coal mines, and the railroad was organized principally to transport the products of the coal mines to the markets, and precisely the same objections and defenses were made in those cases as are made in this case; yet in each instance the right of eminent domain was sustained, and the use declared to be a public use. These precedents are in entire consonance with reason, principle, and the spirit, letter, and policy of the law, and abundantly support the ruling of the trial court in this regard.

Of course, if a railroad company should undertake to condemn land for a purpose that was not within the scope of the powers and purposes legally allowed to railroads, such a proceeding would not only be *ultra vires*, but would be a taking of land for a private use. But the condemnation of land, for the purpose of constructing and operating thereon a railroad, in its very nature and essence, cannot be the taking of land for any other than a public use. Section 14, Art. 12, of our Constitution declares: "Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies com-

mon carriers. The general assembly shall pass laws to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of the State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." And the general assembly has passed such laws, and provides for punishing any railroad that refuses to receive freight or passengers, and has required the Railroad Commissions to see to the enforcement of the law; and has expressly prescribed that mandamus shall lie to enforce the rights so secured, and, in addition, imposes a fine for violation of the law.

If the Constitution is to be respected, it follows, as surely as the shadow does the sun, that land condemned by a railroad can only be used for a public purpose—is a public highway—and therefore cannot be used for private purposes. The land so appropriated and used is as much a public highway as a street in a city, so far as the use is concerned, and can no more be employed or used for private uses than a street can be. This is the purpose, and this is the use, for which the land is sought to be condemned. The right must exist unless it be true that the length of the road, or the volume of business likely to be done, at once limits or qualifies or takes away the right, or changes the character of the use. Such a contention manifestly disproves itself. But authority is not wanting to show that the courts have always refused to put any such construction upon such provisions in a Constitution or in the laws. *Talbot v. Hudson*, 16 Gray, 417; *Colorado E. Ry. Co. v. Union Pacific Ry. Co.*, 41 Fed. 293; *Railroad C. v. Moss*, 23 Cal. 323; *Gaslight Co. v. Richardson*, 63 Barb., loc. cit., 448; *Fanning v. Gilliland* (Or.), 61 Pac. 636; *Hartwell v. Armstrong*, 19 Barb. 166; *Aldridge v. Railroad Co.*, 2 Stew. & P. 199; *Gilmer v. Lime*

Point, 18 Cal. 229; *Coster v. Water Co.*, 18 N. J. Eq. 54; *O'Reilly v. Drainage Co.*, 32 Ind. 10; *Riche v. Water Co.*, 22 Alb. Law J. 498; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq. 75; *Railroad Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Ross v. Davis*, 97 Ind. 79; *Irrigation Co. v. Mehrrens*, 97 Cal. 676, 32 Pac. 802; *Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246. These cases decide that the principle is the same, whether all of the State, or only all the people of the same locality, have a right to demand and receive service from the corporation—then the use or purpose is public, and not private. *Dietrich v. Murdock*, 42 Mo., loc. cit., 283, the court settled the law on this subject in this State in the following concise and clear annunciation: "The legislature, in the exercise of its discretion in delegating to this company the right of eminent domain, evidently proceeded upon the idea that the public interest was, to some extent, at least, to be subserved by its creation. Whether the precise degree of its usefulness to the public might be is not, in our view of the case, necessary to be determined. We think the courts of the country ought not to interfere with the exercise of this discretion, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated to the extent of taking the property of one individual and transferring it to another. The first section of the act (Acts 1846-1847, p. 153), under which this company claimed its corporate existence, declares that 'said company shall have the exclusive power to acquire, own and employ steam power, or animal power, locomotives, cars and carriages necessary for the transportation of passengers, coal and every description of personal property on said road, for themselves and other persons.'" Whether the private interests of this company were such as to require construction of this road, or constituted

main reason for the act of incorporation, with the power conferred by it, is not material. It is enough that, by the terms of the law, it is made a public corporation for the use and benefit of that particular section of the state. The public had a right to demand that the means of transportation, both for passengers and freight, commensurate with its wants, should be provided by the company. Any failure of its duty to the public in this particular, and to transport passengers and freight when offered for that purpose, would have subjected the company to damages. "It must be assumed, then, that the grant of authority to the company to condemn the land necessary for a road-bed was a rightful exercise of legislative discretion." To my mind, the principle is axiomatic—a truism—and needs no precedent to prove or support it. It is absolutely incomprehensible, to my mind, to contend for such a construction, in face of the Constitution and the laws of the state. If the plaintiff condemns this land, the Constitution at once impresses it with a public use. The plaintiff cannot use it for any other purpose. It must serve all people alike, or it can be compelled by mandamus to do so, and forced if it refuses. The fact that all the people of the state do not need it does not change its character or the use it can legally put the land to. No railroad serves all the people. It can only serve the public living along its line, or desiring to travel over it, and if it does this, its right and powers and duties are the same, under the Constitution and laws of this state, whether it is only ten miles long, or is a monster railroad, girding the state from one end to another. (61 S. W., 687-9.) * * *

In the case of *Butte, Anaconda & Pacific Railway Company v. Montana Union R. Co.*, 16 Mont. 504, 41 Pac. 232, the Supreme Court of Montana said:

It is well established that if, in point of law, a use is public, the fact that not very many per-

sons will enjoy the use is not material. *Talbot v. Hudson*, 16 Gray, 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Lewis, Em. Dom.*, p. 241; *Shaver v. Starrett*, 4 O. St. 496; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469; *Rand. Em. Dom.*, Sec. 56. The circumstances that the plaintiff road was built by a private corporation, and that its branches run within convenient contiguity of private mines or ore houses, does not materially affect the road and give a private character to its use, or to the use of its spurs. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the track is never affected by this. "It may be, in such cases, that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturer; yet if there is no exclusion of an equal right of use by others, and the singleness of use is simply the result of location and convenience of access, it cannot affect the question." *Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Railroad Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Railway Co. v. Petty*, 57 Ark. 359, 21 S. Q. 884.

In *Bridal Veil Lumber Company v. Johnson*, 30 Ore. 581, 46 Pac. 790, the Supreme Court of Oregon said:

The fact that it (the railway) has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city or settlement, or other railroad, at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous and sparsely settled country, or

that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway for the use of the public in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised. *DeCamp v. Ry. Co.*, 47 N. J. Law, 43; *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659; *Ross v. Davis*, 97 Ind. 79.

Madura Railway Company v. Raymond Granth Co., 86 Pac. Rep. 27, is a strong case. The Supreme Court of California there holds that the fact that the benefit of the road accrues to a particular individual or class of individuals, does not deprive it of its public character; that the length of the road is immaterial. It also holds that the fact that its rolling stock was furnished by another corporation or that its corporate stockholders are stockholders of a corporation which will be primarily benefited, does not deprive it of its public character entitling it to exercise the right of eminent domain. (See also *Contra Costa Ry. Co. v. Moss*, 23 Cal. 323.)

In *Kettle River Railway Co. v. Eastern Railway Co.*, 43 N. W. 473, the Supreme Court of Minnesota held that the question whether the use is public or private does not depend upon the amount of business done or the number of persons who may have occasion to use the road; but upon the right of the public

to require a corporation to carry their freight. If all the public have the right to use the road, it is a public use or interest, though the number who have business requiring its use be small.

The case of *DeCamp v. Hibernia Railway Company*, 47 N. J. Law, 46, was a case of a mining road. The New Jersey court said:

It is true that the number of persons who will use it for transportation purposes is limited. This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements or machinery for mining purposes into or to obtain ores from the several mining tracts adjacent to the location of the road may use it for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public.

Nor will any motive of personal gain which may have influenced the projectors in undertaking the work, take from it its public character. A particular improvement, palpably for private advantage only, will not become a public use because of the theoretical right of the public to use it; but when the franchise is, in its nature, a public franchise, as the transportation of freight is, and the object promoted is one that concerns the public, as the development of the mining resources of the state, the improvement is essentially for the public benefit and advantage, and if there be no restriction of the right of the public to use it and no inability to use it except such as arises from circumstances, the court in determining whether the improvement is such a public use as that the right of eminent domain shall extend to it, will not scan closely the number of

the individuals immediately profited by it. Indeed it would not be possible to indicate the number of persons or define the area to which the benefit of such an improvement may extend.

The case of *Ulmer v. Railway Company*, 98 Me. 581, 57 Atl. 1001, is often cited. In that case the Supreme Court of Maine, after discussing a number of decisions, said:

It is undoubtedly true that for the present, at least, few persons may have occasion to be served by this branch track, except the owner of the quarry to which it is to be constructed; and we assume that it is equally true that the primary purpose in the construction of this track is to obtain the transportation of freight from their quarry to and over the main lines of the railroad company's road. But, as we have already seen, this is by no means decisive of the character of the use of the road or branch track. * * * In fact this track must be operated by the railroad company for the benefit of all persons that may have occasion to use it. * * * Another cause of complaint * * * is that all the stock of the railroad company is at the present time owned by the Rockland-Rockport Lime Company. * * * Whoever may be the owner of the stock of the railroad company, or however many or few such owners there may be, that corporation still continues to exist as a separate and independent corporation. * * * We cannot, therefore, see how this allegation can in any way affect the question here involved. * * * The question whether or not the railroad company has done or failed to do anything which should result in a forfeiture of its franchises can only be inquired into in a proceeding, appropriate for that purpose, such as an information in the nature of *quo warranto* instituted by the proper authorities in the name of the state. It is not competent in a collateral pro-

ceeding, such as this, to show any matter affecting the forfeiture of a charter.

In the case of *Amos Kent Lumber & Brick Co. v. Assessor* (114 La. 862) it was held by the Supreme Court of Louisiana that plaintiff's railroad, which was only ten miles in length and whose tonnage chiefly consisted of plaintiff's shipments was a common carrier and entitled to the exemption from taxation as provided by the constitution of that state.

In the case of *Chapman v. Trinity Valley & Northern Railway Company*, 138 S. W. 440 (writ of error refused by Supreme Court), the Court of Civil Appeals of Texas passed on the status of the Trinity Valley & Northern Railway Company. This line of railroad is one which the Commission considered in the tapline case, 23 I. C. C. 624. While in that case the Commission recognized that the Trinity Valley & Northern is a common carrier of the proprietary lumber, nevertheless we want to call attention to the views of the Texas court. In an effort to condemn right-of-way for an extension of the railroad, the owner of lands sought to be condemned contended that the railway company was incorporated solely for the purpose of hauling lumber and coal products and kindred freight, for and to the mill of the Dayton Lumber Company, the proprietary lumber company, and that the railway company was not incorporated primarily for the benefit of the public at large. The Court of Appeals said:

As to the first objection above set out, it is true, as stated by appellant in his proposition under this assignment, that the question of public use *vel non* is a judicial question; but admitting the fact that appellee is a regularly char-

tered railroad company, as authorized by the statute under which it has been created, and that the land sought to be condemned is for a right-of-way 100 feet wide, neither of which facts are denied, the facts set out in this objection afford no defense to the application to condemn. By its incorporation the railway became a public highway, and the railway company a common carrier. Const., Art. 10, No. 2. Whatever the motives or the primary purpose of the incorporators may have been, the law imposes upon the corporation certain duties to the public, which it cannot evade, but which by the same power which called it into being it can be compelled to perform. It may not have been called upon to serve the general public either in the carriage of freight or passengers; but it must carry every passenger who presents himself for carriage and every pound of freight offered for transportation, or suffer the penalty prescribed by law.

The character of a way, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. *Railway Co. v. Railway Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508. "At the present day it would hardly be doubted that the mere acceptance of a franchise to build and operate a railway, coupled with the power of eminent domain, would involve the assumption of duties to the public." *Borden v. Rice & Irrigation Co.*, 98 Tex. 510, 86 S. W. 14, 107 Am. St. Rep. 640.

In the case of *Greasy Creek Mineral Company v. Ely Jellico Coal Company*, 132 Ky. 692, the Court of Appeals of Kentucky discussed the application of the state statute authorizing the condemnation of land for spur track. In that case, the condemnation was desired in order to reach a mine within three miles of a navigable stream or railroad. All the freight which the spur railroad could haul would be

that produced by the Greasy Creek Mineral Company. It was there contended that while the statute provided that the owner or operator of such spur track railroad should be controlled by laws relating to other railroads, nevertheless it was purely a private enterprise. We quote from the decision of the court:

Appellee's position is that the building of a railroad by a mine owner for the exclusive use of his own mine is a purely private enterprise; that the operator does not owe or discharge any public duty; and that, if he be allowed to exercise the right of eminent domain, it would be to let one person, under that power which lays alone in the sovereign, take one man's property to another man's private use. We do not find it necessary to enter into a discussion of the power of the state to empower a private person to take property of another by condemnation for private use. The statute in question in this case is a part of the chapter on railroads. It provides for the building of a railroad, not more than three miles long, for a particular purpose; that is, to a mine or quarry. The statute expressly brings such roads, so far as the conditions may apply, within the general laws regulating all railroads. We understand this to mean that these short roads, like trunk lines and other railroads, are subject to the laws affecting common carriers, and that they may be required to serve the public as common carriers. Indeed, such construction seems to have been implied in the opinion in *Bowling Green Stone Co. v. Oman*, 115 Ky. 369, 73 S. W. 1038. It may be that the owner of the track may not have cars and engines with which to serve the public; but if an arrangement be made with another carrier to supply the necessary equipment, and it is done, we perceive no reason why every interest of the public in the matter is not

satisfied. We held in *L. & N. R. R. Co. v. P. & Ky. Coal Co.*, 111 Ky. 960, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447, that in using such spur tracks the operating railroad company was bound to serve all the public alike, and could not by contract limit its services to one customer upon the spur. This construction rescues the section from the vice imputed to it by appellants. The Legislature must have intended by the language of the section bringing these short lines under the general law affecting railroads as carriers to make them servants of the public. A coal mine generally requires a great many people to operate it. Its product, while shipped out by one consignor, is destined for a considerable number of consignees. The road serves not only the miners in hauling in their supplies and the like, but the coal shipping public in hauling out the coal. The fact that the circumstances are such that but one commercial commodity is shipped over the road makes it none the less a common carrier serving the public in that capacity. Being a *quasi*-public corporation, it was competent for the Legislature to empower it to exercise the right of eminent domain. *Chesapeake Stone Co. v. Moreland*, 104 S. W. 762, 31 Ky. Law Rep. 1075; Lewis, Em. Domain, section 170.

A very similar question was involved in the Commodities case, 213 U. S. 366-417. As to one of the companies contesting the validity of the Commodities Clause a contention was made somewhat similar to the Commission's finding in the Tap-Line case. The Delaware & Hudson Company was a corporation organized under the laws of the State of New York and by its charter was authorized to construct a canal from the anthracite coal district in Pennsylvania to the Hudson River in New York, to purchase

lands, to mine coal and to market the same from such lands. By subsequent statutes the Delaware & Hudson Company was authorized to invest capital in the construction of rails from its own lands for the hauling of its own coal and coal mined or purchased by it under leases; its own coal amounted approximately at the time of the hearing before this court to 70 per cent. of the entire transportation over its rails. After the year 1870 the Delaware & Hudson became, incidental to its business as a coal mining company, a common carrier by railroad of passengers and property. Under these facts it was contended by the Delaware & Hudson that it was not a railroad company within the meaning of the Commodities Clause. We quote from the decision of this court:

There is a contention as to one of the defendants, the Delaware & Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the States of New York and Pennsylvania, it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines; and, undoubtedly, vast sums of money have been invested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that, by the true construction of its charters, the Delaware & Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The

facts stated in the excerpts from the answers and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause, and subject to the regulations which are embodied herein, as we have interpreted them.

To a like effect was the holding of this court in the Union Stock Yard & Transit case, 226 U. S. 286, wherein this court held that the Union Stock Yards & Transit Company and Chicago Junction Railway Company, both corporations under the laws of the State of Illinois, were common carriers subject to the Act to Regulate Commerce. The Union Stock Yards & Transit Company did nothing but furnish the track which it leased to the Chicago Junction Railway, and load and unload live stock. The Chicago Junction Railway, with its own motive power, moved traffic over the rails leased from the Union Stock Yards & Transit Company. The charter of the Stock Yards Company authorized it to locate, construct and maintain all necessary yards, enclosures, railway lines, tracks, switches and turn-outs for the reception, weighing, delivering and transfer of cattle and live stock and also of dead freight that may be at or passing through or in the City of Chicago and as well for the accommodation of a general Union Stock Yards for cattle and live stock. The charter further provided that the company should construct a railway from the Stock Yards to a connection with the tracks of all the railroads terminat-

ing at Chicago. Later the Stock Yard Company leased all of its tracks to the Chicago Junction Railway Company and all the operations of the railway including the movement of cars, both empty and loaded, was performed by the Junction Railway Company. The Stock Yard Company did not perform any service whatever except the loading and unloading, aside from the owning of the leased rails and equipment. Stock in both the Stock Yard & Transit Company and the Chicago Junction Railway Company was owned by the Chicago Junction Railways and Stock Yards Company, a New Jersey corporation. The Stock Yard Company, under the lease, receives two-thirds of the profits of the Junction Company from the performance of the service in connection with the railroad transportation. The Commerce Court had held that the Chicago Junction Railway Company was a common carrier engaged in interstate commerce, but that the Stock Yard Company was not a common carrier. We quote from the opinion of this court:

In view of this continuity of operation, the manner of compensation and the performance of services in connection with interstate transportation by railroads such as are described, are the Stock Yard Company and the Junction Company subject to the terms of the Act to regulate commerce and bound to conform to its requirements?

The Interstate Commerce Act, as amended by the Hepburn Act (34 Stat., sec. 1), applies to common carriers engaged in the transportation of persons or property from state to state wholly by railroad, and the term railroad is defined to include "all switches, spurs, tracks and terminal facilities of every kind used or neces-

sary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property;" and transportation is defined to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

That the service is performed wholly in one state can make no difference if it is a part of interstate carriage. "The transportation of live stock," said this court in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, in treating of the duties of common carriers, irrespective of the Act to regulate commerce, "begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee." In this connection see *Coe v. Errol*, 116 U. S. 517; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498.

The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, *supra*, to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service. *Southern Pacific Terminal Co. v. In-*

terstate Commerce Commission, supra; Ohio R. R. Comm. v. Worthington, 225 U. S. 101.

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. *They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by great railroad systems which use them.*

We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a state. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company for it still receives two-thirds of the profits of that company, and both companies are under a common stock ownership with its consequent control. We therefore think the

Commerce Court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission and that it should also have held the Stock Yard Company subject to the provisions of the interstate commerce Acts.

It should be noted that the ownership of the Chicago Junction Railway and the Union Stock Yard & Transit Company was in a common control, viz.: that of a New Jersey holding corporation. This court applied the language of the Act to Regulate Commerce just as it reads. Here was a railroad furnished by the Stock Yards & Transit Company. The operation of that railroad was performed by the Chicago Junction Railway. To the extent that each furnished a part of the transportation defined by the Act to Regulate Commerce this court holds each a common carrier.

The test applied by this court, and which we have set forth in italics above, rests upon three matters:

1. Terms of charters.
2. Holding out to the public as common carriers.
3. Recognition and treatment by the trunk lines.

The record before the Commission, even the decision of the Commission itself, shows a charter as a common carrier and a strict compliance with all the obligations of a common carrier. As to the second basis each one of the appellee railroads held themselves out as common carriers, published tariffs of their charges and filed them with the proper Commission, accepted freight for all upon the same terms and under the liability which the statutes and

the common law impose upon common carriers. Each of the appellee railroads has been recognized by all its trunk line connections as a common carrier. Joint rates were published applying over the appellees' lines and the trunk lines jointly as though they were single lines. Bills of lading, interline settlements, in short, all the affairs of the trunk line railroad and the appellee railroads so far as they affected each other were conducted upon the same basis and in exactly the same manner as are similar transactions conducted among trunk lines.

This court at the present term in the case of *United States v. Baltimore & Ohio Railroad Company et al.*, commonly known as the "Sugar Lighterage" case, held that the movement of sugar both of the Arbuckle Brothers and of the public generally from the Jay Street Terminal to Jersey City was transportation. We shall later more particularly refer to this decision, but set forth here the particular portion of the opinion just referred to:

"Assuming then, that the lighterage service performed by the Federal Sugar Refining Company was a service by it for its own convenience for which the railroads were under no obligation to make compensation, we come to the question whether the facilities employed and the service performed by Arbuckle Brothers in respect to their own sugar after delivery at the Jay Street terminal are accessorial, or services in aid of railroad transportation for which they may be paid a reasonable compensation without discriminating unduly against the Federal Sugar Refining Company.

That the plain purpose of the contracts between the several railroad companies and the Terminal Company was to constitute the dock

and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners and not by virtue of a fee simple title or a lease is of no legal significance. *Central Stock Yards Co. v. L. & N. Railroad*, 10 I. C. C. Rep. 175; *Cattle Association v. C. B. & Q. Railway*, 11 I. C. C. Rep. 277. Nor is there the slightest substantial evidence that in the selection of the premises of Arbuckle Brothers there was any purpose to give them as large nearby shippers any preference or to unduly discriminate against competing sugar refineries. The premises were ideally adapted to meet the necessities of the great manufacturing and commercial business interests along the river front of Brooklyn and constituted the only property reasonably obtainable by the railroads for the extension of their lines of transportation to the Brooklyn side of East River. That through instrumentalities furnished by the Terminal Company and the service by it performed transportation by the railroads begins and ends at this station, is most obvious. * * * The order of the Commission is made to rest upon an erroneous assumption that the services performed by Arbuckle Brothers in respect of their own west-bound shipments of sugar after the delivery of such sugar at this station is a shipper's service done for their convenience, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensation unless a similar compensation is allowed to the Federal Sugar Refining Company for the light-erage of its sugar to the west shore railroad terminals."

The foregoing decisions are complete and all embracing both by the common law and by the statute. It appears that every movement of property by rail

in interstate commerce is subject to the act. The movement of logs by each of the four appellee railroads from the forest to the respective mills of the appellee lumber companies is a transportation service by a common carrier. Had there been different ownership the Commission would have reached an entirely different conclusion. Identical service in kind is performed by all the trunk line carriers in this territory for mills located on their lines. Identical service in kind is performed by the appellee railroads for all non proprietary shippers. We think this court will have no difficulty in finding that the service performed by each of the appellee railroads in moving lumber from the mill of the appellee lumber companies to the trunk line connection is a service of transportation by common carrier.

II.

THE APPELLEE RAILROADS ARE NOT PLANT FACILITIES,
AND DO NOT PERFORM A PLANT FACILITY SERVICE FOR
THE APPELLEE LUMBER COMPANIES HEREIN.

The Act to Regulate Commerce does not recognize a plant facility ex nomine.

Only in recent years has there been any attempt by the Commission to create the hybrid railroad, from one point of view it appearing to be a railroad and from another not a railroad. An examination of the Act to Regulate Commerce finds no reference to any such hybrid, nor does its creation result in any benefit to the public or any shipper. It is true that the trunk line railroads have profited by this

creation of the Commission. The money heretofore earned out of the joint rate by the so-called "plant facility" now inures to the benefit of the trunk line railroad. The record in this case shows that as a result of the decision of the Commission the trunk line carriers in the southwestern yellow pine producing section have profited by not less than \$3,000,000 annually as a result of the Commission's decision in this case.

The language of the act in its every provision, negatives the recognition of a class of railroads who are common carriers for one person, and not common carriers for others. And in this connection we are again reminded that but for the ownership of the proprietary lumber company there would have been no order entered against the appellees herein. In fact, where there has been a separation of ownership between the lumber mill and timber holdings from the railroad, the Commission has itself withdrawn its prohibition against joint rates. In the case of the *Beaumont & Great Northern*, the owner of the railroad and the lumber company sold both interests to other parties who prior to such purchase had no interest in either the mill or the railroad. Some months later the previous owner of the mill and the railroad, repurchased the railroad only. The Commission now holds that that railroad is within every sense of the act a *bona fide* common carrier of the lumber produced by the mill which had been formerly owned by the owner of the railroad. (*Beaumont & Great Northern Railroad v. A. T. & S. F., et al.*, 24 I. C. C. 161, 163.) Had there, however, been no severance as to the two properties,

the service performed by the railroad company would have continued to be not a service of transportation but a plant facility and service. The whole argument of the Commission rests upon the theory that lumber manufacture in the southwest, upon its present extensive scale, could not profitably be carried on without a railroad; that what is necessary to the profitable performance must be a part of the performance, and, that, therefore, the railroad is a plant facility.

In the case of some of the appellees in these cases, the railroad already existed and had existed for many years prior to the building of the proprietary mill. In the case of the Mansfield Railway & Transportation Company, that railroad had existed and served the public in the town of Mansfield, Louisiana, for more than ten years prior to the building of the mill. And yet the Commission holds that that same railroad, which today serves the Frost-Johnson mill, has ceased, as to that mill, to be a common carrier and is now a plant facility. If John Jones owned the Mansfield Railway & Transportation Company, admittedly the Commission would not extend its order in the tap-line case to embrace the Mansfield Railway & Transportation Company. Further the Commission has decided in a number of cases where the trunk line railroad hauls logs to a mill located along its line but owned by a wholly independent party, the service in moving the logs to the mill is that of a common carrier. To transport means to carry. Transportation is the service of carriage. And under the law, the distance trans-

ported is wholly immaterial. On many of the trunk lines in the southwestern yellow pine territory there are what is called milling-in-transit rates. The logs are hauled to the mill, there cut into lumber and the lumber transported from the mill to the consuming market. This is transportation recognized by the Commission, the only exception being that if the haul is performed for persons interested in the railroad, and the tonnage is so large as to constitute practically the entire tonnage of the railroad, then the service performed is that of a plant facility.

In the case of *Crane Iron Works v. United States*, the Commerce Court announced a definition of a plant facility. The Crane Railroad was very limited in its extent and was practically confined to the handling of cars between various points in the plant of the Crane Iron Works and to a connection with the Central Railroad of New Jersey. The decision of that court upholding the Commission's dismissal of the petition of the Crane Iron Works was based upon the provision in Section 15, conferring upon the Commission authority to establish joint rates and through routes. That court held that the authority conferred upon the Commission was discretionary and that it could refuse to establish joint rates and that the court would not review that discretion. We quote from that opinion:

But the dismissal order in question rests upon another basis, which will be briefly considered. Upon all the circumstances connected with the location, construction and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing serv-

ices which the iron works should perform for itself if it desired such services, and that the Central Railroad was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Co. v. N. Y. C. & H. R. R. Co. et al.*, 14 I. C. C. Rep. 237; *Solvay Process Co. v. D. L. & W. R. R. Co.*, 14 I. C. C. Rep. 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

But the argument is earnestly pressed that such a relation cannot as matter of law be predicated of an incorporated railroad which is declared to be a common carrier by the fundamental law of the state of its creation. In other words, it is insisted that the Crane Railroad, being in law a common carrier and performing the functions of a common carrier, cannot be a plant facility of the Crane Iron Works, but must be regarded as a common carrier for the Crane Iron Works, and entitled as a matter of legal right to a just share of the transportation charge which the Central Railroad makes and collects for carrying the traffic of the iron works; and on this theory it is argued that the finding and conclusions of the Commission involve an error of law which this court should correct.

We are constrained to reject this contention. Whether the Crane Railroad is a plant facility

as to the Crane Iron Works or a common carrier of the traffic of that concern must be held to be a question of fact which is not affected by the circumstance of incorporation. We understand it to be admitted that the operations of this railroad when it was owned and operated by the iron works were the operations of a plant facility. It is contended, however, when the railroad was separately incorporated and passed from the ownership of the iron works, that its relation to the latter and the legal character of its services became immediately changed. That is to say, the mere fact of the separation of ownership and the transfer of the title and control of the railroad property to a new corporation, although there was not the slightest change in what was actually done, operated in legal effect to transform a plant facility into a common carrier and to impose obligations on the Central Railroad, as to the traffic of the iron works, which it could not theretofore have been required to assume. We cannot believe that any such result was accomplished. The rights and duties of the Central Railroad respecting the iron works could not thus be altered. If its obligations as a common carrier were fully discharged and its tariff rate earned by delivering cars to and taking them from the exchange tracks before the iron works parted with its railroad, its rights and duties respecting that concern were neither increased nor diminished by the creation of the Crane Railroad. The services rendered to the iron works continuing to be precisely the same in point of fact, this railroad continued to be utilized as the facility of the iron works' plant in the same way after as before incorporation.

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers. Whether considered from the standpoint of law or of practical ad-

ministration, it seems reasonable to hold, as the Commission virtually held in this case, that a railroad of the kind in question may have this dual character and perform services for one concern which are not the services of a common carrier, but which that concern is bound to provide for itself, notwithstanding it occupies the relation of a common carrier to other concerns and the public generally. Concededly, the work which the Crane Railroad does in moving cars between different points in the iron works' plant has none of the incidents of common carriage, and why may not the same thing be affirmed of the work it does in switching cars for the iron works to and from the exchange track with the Central Railroad, even if the work it does for the other industries makes it as to them or the shippers of Catasauqua a common carrier?

The Commerce Court adopted the distinction which the Commission had laid down in the General Electric and Solvay Process cases as differentiating a plant facility from a common carrier service. It is sufficient here to state that those distinctions laid down by the Commission were based upon the facts which were of record in those two cases. (14 L. C. C. 237-246.) In the General Electric case there was no corporation common carrier performing any service whatever. The General Electric itself, as one of the departments of its business, performed the service of taking its own property from storage tracks where the trunk line connection had placed the cars and switched them to its shops, foundries and other buildings. All these tracks, both the storage tracks and the tracks between the various points in the plant of the General Electric, were within a fence which marked the limits of the General Electric

property. In other words, all the services performed by the General Electric Company were entirely within the plant of the General Electric Company and that company did not in any wise serve any other shipper.

In the Solvay Process case, the Solvay Process Company operated certain tracks in and about its plant at Solvay, New York. The interchange track with the plant of the Solvay Process was upon its property and the entire service of moving loaded and empty cars from and to the interchange tracks, or between points within the plant, was performed upon its property.

So that it appears in each of these cases that the manufacturing plant of both the General Electric and the Solvay Process required the use of locomotives and railroad tracks. It was no part of the transportation service customary in that territory for the Railroad Company to go upon the private tracks of these two companies and switch the cars about. Any service performed by the railroad company in this respect was not a transportation service which the General Electric or Solvay Process could compel without compensation.

In the case at bar we have an entirely different situation. The appellee railroads are no more necessary to the manufacture of lumber than are the rails of the trunk line connections. Raw material is transported by all the railroads of the country. That service is no part of the manufacture. The finished product of every saw-mill in the country must be transported to the consumer and that service is performed by the railroads of the country, a serv-

ice which, we may add, is as much for the consumer or consignee, as it is for the mill-man, and is no part of manufacture. If the Southern Pacific or the Santa Fe owned the tracks of the appellee railroad companies there would be no contention whatever that these tracks are plant facilities.

In none of these cases is there a condition which approaches in any wise that which existed in the case of the Crane Railroad. That road was nothing more or less than a net-work of tracks connecting different parts of a steel mill and for the most part was enclosed by a fence, so that it became, in every sense of the term, a private plant, and was used in the manufacturing process and not in transporting raw material to the mill, or the finished product therefrom.

In the case of each of the appellees the railroad is extensive, is built over the lands of various people, is incorporated under the laws of the state where operated, files tariffs of its charges with the proper authorities, and in every way complies with the laws of the state.

The Commerce Court, in discussing this plant facility question in the case at bar, said:

Nor may the line be drawn on the basis of what is and what is not essential to the industry. Transportation would not flourish without manufacturing; manufacturing could not be successfully carried on without transportation; they are distinct activities; but both are essential to the industry. Raw materials must be brought to and the finished product must be carried from the mill; whether any particular service involving an actual hauling of the goods is transportation or industrial depends upon whether, on the

one hand, it is an interindustry act, a step in the manufacturing process, or, on the other hand, a movement of raw material from without to the mill or of finished product from the mill toward the market. Every actual carrying of each part of the material or product is, of course, not a transportation service; the Crane Iron Works case (*supra*) well illustrates this. In that case, as in other cases therein cited (*General Electric Co. v. N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237; *Solvay Process Co. v. D., L. & W. R. R. Co.*, 14 I. C. C. 246), it was held that the hauling between buildings of an extensive plant was a part of the manufacturing, not of the transportation operations; that the transportation ended, as to raw materials, when the common carrier had performed all that it could have been required to perform and all that it did for nonproprietary mills—that is, when it made delivery at some point on the plant; that any further activity on the part of the tap line common carrier within the plant itself could not have been compelled and was not a transportation service for which the trunk line could pay either an allowance to the industry or a division of the joint rate to the tap line as a common carrier.

But the situation here is totally different. The actual service in transporting logs to or lumber from the proprietary mills in no respect differs from that performed for independent mills; the carriage over the tap line ranges from a short switch to a many-mile haul; its purpose, so far as the lumber is concerned, is not to serve the industry in its internal operations, but directly to serve both the mill, as shipper, and the general consuming public, as consignees and purchasers. When these tap lines, which it must again be emphasized, are not private carriers, but are admittedly for some purposes interstate common carriers, take the carloads of finished lumber at the mills for the purpose of either hauling or switching them to a trunk line so

that they may reach their ultimate destination beyond the State, the interstate transportation has actually begun.

Our position, summed up, is this: Each of the appellee railroads, when it receives timber or logs, and transports those logs toward the ultimate destination of the finished product of those logs, is not a plant facility, but is performing a transportation clearly embraced within the provisions of the Act to Regulate Commerce. The stoppage of the logs and their milling do not affect the service performed by the railroad. The movement of the lumber from the mill to the railroad is not part of manufacture, but is transportation, and is performed not only for the consignor, the manufacturer of the lumber, but is performed as well and in the same degree for the consignee, the consumer of the lumber.

III.

THERE WAS NO EVIDENCE UPON WHICH THE COMMISSION COULD BASE ITS FINDING THAT THE PARTICIPATION BY THE APPELLEE RAILROAD IN JOINT RATES UPON THE LOGS AND LUMBER OF THE APPELLEE LUMBER COMPANIES CONSTITUTES AN UNDUE AND UNREASONABLE PREFERENCE OR SUBJECTS ANY PARTY TO UNJUST DISCRIMINATION WITHIN THE MEANING OF THE ACT TO REGULATE COMMERCE.

We must, in determining the Commission's view as to discrimination, take its report as constituting the basis for the holding that discrimination results from the application of joint rates upon the logs and lumber of the appellee lumber companies. At page

283 the Commission announces that discriminations are apparent upon the face of the record. The only discrimination which the Commission finds is that arising from the division of the joint rate. The amount of this division the Commission says is not governed by the extent or character of the service performed by the short line, but results to some extent from the "bargain made between the carrier and the lumber company." And on page 284 the Commission further says:

This difference in the treatment by carriers of lumber companies owning incorporated tap-lines is one form of discrimination growing out of tap-line allowances. But there are also other forms. There is the discrimination involved in the payment of allowances to one lumber company through its incorporated tap-line, while the same public carrier in the same territory refuses to make any allowance to another lumber company using a tap-line that has not been incorporated, but where all the other conditions, as well as the extent of the service, the mileage, motive power, cost of operation, etc., are substantially similar.

The trunk lines may be discriminating in refusing to make joint rates with some of the short line roads while contemporaneously they make joint rates with others; this discrimination should be cured by the Commission, not by forbidding the making of joint rates with the one carrier, but by requiring the trunk line to extend the application of the joint rate to the short line theretofore not a party to joint rates. But this discrimination, which the Commission has set forth in the above excerpt, is no different than

that resulting from the Commission's order itself. For example, in the case of the Trinity Valley & Northern Railroad, the Commission fixes as a maximum allowance for a haul of one mile one cent per hundred pounds. (Rec., 624.) In the case of the Mansfield Railway & Transportation Company, appellee herein, the Commission declines to allow any division, although there is a haul of two and one-half miles.

In the trial of the cases before the Commission, intervenors had alleged undue and unjust discrimination because of the divisions of the joint rate. But when asked to point out whether his competition came in a greater degree from those lumber men who were interested in short line railroads, than from other intervenors, he was compelled to answer that he could not distinguish one competitor from another in the open market. This intervenor was asked as to whether the discrimination which did result because of the division, would be determined by the "sale price." To this the witness gave assent. When it was attempted to put into the record the sale prices of all the intervenors as compared with all the lumber companies owning tap-lines, objection was made and the objection was sustained by the Commission.

There is not a single syllable of testimony in the record which points out a single instance of loss of business, by any of the lumber interests not owning or controlling short line railroads, to any interest so controlling a railroad. Nor is there any evidence whatever of any discrimination, just or unjust, or any preference, due or undue, arising from the fact

that joint rates were in effect from the lines of the appellees and their trunk line connections, save the existence of such joint rates in and of themselves.

The Commission made a similar finding in the elevator cases, and we cannot better illustrate our contention than to set forth the Commission's finding in the elevator cases as to discrimination and the final decision of this court reversing the Commission's finding.

The Commission found that the payment of elevation charges to Peavey & Company resulted in unjust discrimination; we quote from that opinion:

14 I. C. C. 324.

(a) That Company might derive an advantage from the fact that the amount paid for the service was greater than the cost of the service itself. If they received more than the expense to them, they would manifestly obtain an advantage over a competitor who did not perform the service by exactly the amount of difference between the sum paid and the cost to them. * * *

(b) There is an entirely different discrimination arising from the fact that Peavey & Company, as grain dealers, must have these facilities of elevation. That the service which they performed for the railroad company also involves a service necessary to themselves as grain handlers, and that therefore the railroad pays them for a service in connection with their own grain, which their competitor must furnish at his own cost. This is perfectly seen by assuming that some elevator is located upon the line of the Union Pacific at Omaha or Council Bluffs which does not receive the allowance.

It must be kept in mind that this elevator service is absolutely essential to the business of Peavey & Company. They could not transact a

grain business at Omaha without it. The evidence shows that practically all the grain handled into the elevator is their own; hence the service which they perform in storing and transferring this grain for the Union Pacific differs in no respect from the service which they would perform, except in rare instances, if they were not operating under this contract.

The competitor of Peavey & Company also owns a line of country houses upon the Union Pacific, with a terminal elevator located at Omaha and performs for the Union Pacific in the handling of its business, exactly the same service as does Peavey & Company, and probably at substantially the same expense; yet Peavey & Company are paid one and one-fourth cents per 100 pounds, while their competitor receives nothing at all. This allowance, as we have already seen, is often more than the entire profit from the handling of the grain; hence as a practical matter there arises in the working out of this contract a discrimination in favor of Peavey & Company as against other elevators at Omaha. * * *

(c) A third discrimination still remains. While this is termed a transfer charge upon the tariff and is only paid upon grain which actually moves out from Omaha, it is, in fact, under actual conditions, an elevator allowance, and is paid by the Union Pacific for the purpose of inducing the elevation of grain at Omaha. In other words, the Union Pacific pays for the unloading of a carload of grain when discharged into an elevator and requires the consignee to pay for the unloading if that grain is unloaded by any other means. This is a clear discrimination in favor of the elevator against the consignee who does not employ the service of an elevator in the unloading of his grain * * * the same discrimination would arise against a shipper who, though desiring to use an elevator, did not wish to use it at Omaha.

Commissioner Harlan wrote a concurring opinion, 14 I. C. C. 331, 332, in which he said:

But I agree that any allowance by the carrier to the owner of an elevator on grain belonging to him that has been weighed, inspected, cleaned, mixed, or otherwise treated in the process of elevation, is unlawful. As a facility for the convenience of the carrier, free elevation is unobjectionable; but when the owner is permitted to and does use the elevation as a transit privilege for himself, by means of which to secure commercial advantages on his own grain, the result is an unlawful preference and discrimination.

Commissioner Clark concurred in the views expressed by Commissioner Harlan.

Now on this state of the record, an order having been entered forbidding the payment of any allowances to Peavey & Company, or any one else at the Missouri River, suits for injunction were brought by Peavey & Company to enjoin the order of the Commission. The Circuit Court, sitting *en banc* (Sanborn, Hook and Adams), held the order of the Commission invalid as beyond the power of the Commission. Judge Sanborn, in writing the opinion of the court, discusses the opinion of the Commission as to discriminations; we quote at some length from that opinion:

176 Fed. 409.

Laying aside the question of the constitutionality of the orders challenged in these cases, let us consider this question: Has the Commission been empowered to prohibit allowances and payments of compensation for the transfer by elevators of grain in transit? The statutes under which the Commission acts require the rates for transportation, and hence for the elevation of

grain in transit, to be just and reasonable. Elevation is a part of transportation which the law requires the carriers to provide, and for which it authorizes them to pay others reasonable compensation. The three-fourths of a cent per 100 pounds which the carriers now pay for this service at the Missouri River cities is a just and reasonable compensation for it. Whence comes the power of the Commission to forbid this payment? From the facts, says the Commission, that those who receive this compensation generally own the grain which they transfer and the elevators by means of which they transfer it, that they derive pecuniary advantages which those who do not own the elevators and also the grain transferred do not secure by treating, that is, by cleaning, clipping, mixing, and grading the grain, as it passes through the elevator, thereby enhancing its value, and that there is danger that they may use the practice of allowing this compensation to violate the acts of Congress, to secure rebates and effect unjust discrimination. That although other considerations are mentioned in the opinions of some members of the Commission, the facts above stated are the only ones upon which the Commission relied to sustain their authority to make the orders in question, let its opinion upon the motion for another hearing (14 Interst. Com. R. 510), and the order in the case of the Union Pacific Company which permits it to make this allowance to Peavey & Co. on condition that the latter separates its elevation or transfer in transit from its treatment of the grain, witness.

But the legal presumption is that parties will obey the law and discharge their duties. Reasonable compensation for transfer services may not be denied lawfully because there is a possibility that those who receive it may at some future time violate the law and secure rebates or effect discrimination. There is no more power in the Commission to forbid carriers from pay-

ing or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property, because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.

The treatment of the grain in the elevators, the cleaning, clipping, mixing, inspecting and grading of it is a trade service; it is no part of transportation and is not a transportation service. No power has ever been granted to the Interstate Commerce Commission to regulate, to prohibit, to separate by miles from the service of elevation and transfer in transit or from any other transportation service or to interfere with this trade service. The advantages derived from it are of the same nature as those which the owners of mills enjoy who manufacture into flour in transit the wheat which they own and ship, who saw into lumber in transit the logs which they own and ship and who dress in transit the rough lumber which they own and ship. They are of the same nature as those which the owners and shippers of cotton who practically own the compresses derive from compressing the cotton in transit, and yet in all these cases the carriers maintain, and the Commission sustains, the same rates of transportation for the shippers who own the mills, the compresses and the articles transported, and the shippers who own none of these facilities of trade and derive none of the advantages thereof. See the authorities cited at the opening of this opinion. They are of the same nature as those which the owners of cars leased to a railroad company who are shippers of the articles transported therein may derive from that ownership. *Consolidated Forward-*

ing Co. v. Southern Railway Company, 9 Interst. Com. R. 182, 206e.

It is no part of the duty, nor is it within the power, of the Commission to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tipple from which he loads it gains no greater profit from the handling of his coal than the one who loads it from a wagon. *Harp v. Choctaw, Oklahoma & Gulf R. Co.*, 125 Fed. 445, 61 C. C. A. 405. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership, and not to the transportation of the articles shipped, and the consideration and regulation of these advantages are without the scope of the Commission's power.

The truth is that trade advantages of this nature do not condition the questions of reasonableness of rates, of rebates or of discrimination. The shipper who owns warehouses, tipples, spur tracks, cars, mills and by their use derives greater profit from the dealing in the articles which he ships over a railroad, is entitled to the same rate of charge for transportation and the same reasonable compensation for transportation services which he renders than the shipper who owns less or no such trade facilities and derives less profit is entitled to. The reasonableness of and the discrimination by the charge and the compensation is conditioned by the reasonable value of the service, not by the gain or the loss which the shipper derives from the use of the trading facilities he owns in the handling of the articles transported. The pecuniary advantages that result to the owners of

elevators, who are also shippers of the grain, from its treatment in their elevators, are derived, not from the transportation of the grain nor from its elevation or transfer in transit through their elevators, but from their ownership or their operative control of the elevators, and their use of them in the conduct of their trade. They are therefore *ultra vires* the Commission and immaterial to the issues whether or not the compensation or allowance to the owners of elevators who are also shippers is reasonable, unjustly discrimination, or violative of the prohibition against rebates, and when these advantages are laid aside this compensation or allowance is neither.

That the Commission is without power to prohibit carriers from paying or allowing to the owners of elevators reasonable compensation for elevating grain in transit which they own and ship is demonstrated by the course of decision and legislation that is crystallized in the amended interstate commerce act. Prior to 1906, that act contained no declaration that elevation or transfer in transit was a part of transportation, or that compensation might be charged or allowed therefor. After the Commission had decided, in 1904, that the allowance by the Union Pacific Company of one and one-four cents per 100 pounds to Peavey & Co. for the elevation of the grain in transit, the larger portion of which Peavey & Co. owned and shipped, in the year 1905, the Commission made this report and recommendation to Congress:

“Terminal roads, elevator charges and private cars.

There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or per-

forms any part of the transfer service. Such performance may take the form of an excessive diversion to a terminal road owned by the shipper, the payment of an excessive mileage charge to the owner of the grain; the payment of an excessive mileage upon the private car which carries the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of proffering one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facilities furnished more advantageously both to shipper and railway and without injury to the public, if provided by the shipper itself. We do think, however, that the Commission should be empowered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the services rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

Thereupon the Congress amended Section 1 of the act so that it provides that transportation shall include "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, stow, stowing and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act, to provide and for

prescribed the remedy and fixed its limit. It is that the charge and allowance to the owner of the elevator, who is also the shipper of the grain, shall be no more than is just and reasonable, and the limit of the power of the Commission is to determine what is a reasonable charge as the maximum to be paid by the carrier for the service. Counsel argue that this view ignores the power vested in the Commission to prevent rebates under Section 2, and to repress regulations and practices of carriers that are unjustly discriminatory or unduly preferential under Section 3, and Section 15 of the amended act. But the permission granted by the amendment of 1906, to continue the known regulation and practice of allowing reasonable compensation for elevation and transfer in transit to shippers who were also the owners of elevators, and the clear limitation in that amendment of the power of the Commission to the determination of the reasonableness of the allowances thus made, was, in view of the knowledge of the Congress and of the common knowledge of the pecuniary advantages derived by such shippers from this practice, a conclusive legislative determination that, when the allowances were reasonable, neither the fact that the shipper of the grain was the owner of the elevator, nor the fact that he enhanced the value of his grain by treating it during the elevation and transfer in transit, constituted a rebate, an unjust discrimination, an undue preference, or a repressible danger of either. It was not only a clear withholding from the Commission of the power, but an implied and effective prohibition of the Commission, to forbid the allowance to such shippers and owners of reasonable compensation for the elevation and transfer in transit of their grain through their elevators.

Again, the allowance here in question was not a rebate because it was not a concession from the published schedules, but an allowance in ac-

cordance with them. If it had been discriminatory, it would have been because the entire rate of transportation charged by the carrier after this allowance was deducted would have been unduly preferential. But the allowance was only reasonable compensation for the service rendered, and the lawful remedy, if such discrimination existed, could not have been to deprive the owner of the elevator of such compensation for the service of transportation it was rendering and thereby of a beneficial use and of a portion of the value of its elevator. In *Interstate Commerce Commission v. Stickney* (Circuit Court, November 29, 1909) 164 Fed. 638, 643, 644, the Supreme Court affirmed an injunction against an order of the Commission which reduced a reasonable terminal charge of \$2 per car to \$1 per car on the ground that the rate of the carrier plus the terminal charge was in its opinion unreasonably high, and held that the Commission's remedy was to reduce the carrier's rate, and that it was beyond its power to reduce the terminal charge below reasonable compensation for the service. By the same mark it was beyond the power of the Commission to prohibit the allowance or payment to the owners and operators of elevator of reasonable compensation for elevation because the carriers' rate, together with that payment or allowance, was discriminatory. The result is that the orders in these cases were beyond the power of the Commission, and that they cannot be sustained.

Counsel have presented arguments upon which the orders of the Commission and its announcement that the principle upon which they are founded will result in universal prohibition of payment to owners and operators of elevators throughout the land of any compensation for elevation obviously do not rest. But these arguments have also been carefully considered.

It is said that the grain upon which the al-

lowance is made is not elevated or transferred in transit because it is shipped from points of origin in Kansas and Nebraska to the Missouri River upon local rates and local waybills. But a proportional rate is the balance of a through rate. There are proportional rates from the Missouri River to the Mississippi River and to points east, north, and south which are less than the local rates between those points, and this grain which comes from points west of the Missouri River takes, not the local, but these proportional, rates east of the river upon the certificates or expense bills of the companies west of the river which show whence it came. Ninety per cent. of the grain which comes to the Missouri River points passes through them to points east, north, and south. The schedules of the carriers and their practice limit this elevator allowance or payment to grain coming into the elevators from the west which is actually loaded out into cars sent north, south, or east, and this service of unloading grain out of cars which have brought it from the west and loading it into cars which carry it to points east, north and south is "elevation" and "transfer in transit" within the meaning of the amended interstate commerce act.

The rate of transportation from points west of the Missouri River through the cities upon that river to St. Louis and other eastern points is the same to all shippers. All shippers are offered the option of sending their grain through these cities with or without elevation for the same price. The railroad company pays out of the amount it receives from this uniform rate three-fourths of a cent per 100 pounds to the elevator men at the river for the elevation of that part of the transported grain which is elevated in transit there in consideration of a prompt return and full use of its cars. It is insisted that this constitutes a rebate and an unjust discrimination because the net amount retained by the carrier is three-fourths of a

cent less on grain elevated than on that which is not elevated, and because the shipper who elevates his grain receives a service that he who does not elevate it fails to obtain. But this is not a rebate because there is no concession from the published rate here, but an allowance in accordance with that rate (section 2), and because the same service of elevation is offered to all shippers at the same price, and they are all able to accept it, and there is neither rebate nor unjust discrimination where such an offer is made, although some accept and others reject its advantages. *Nicholson v. Great Western Railway Company*, 1 Nev. & McN. 121, 125, 149.

Much is said in argument of discrimination and preference. While general expressions may be found in the opinions of the courts to the effect that there must be no difference in charges not based on difference in service and that the interstate commerce act was passed to secure equality of rates and to destroy favoritism (*New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515), the legal effect of the act is that declared by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, in these words, which have been three times affirmed and adopted by the Supreme Court as the true interpretation of the law:

"Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so

as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." *Interstae Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 493, 17 Sup. Ct. 896, 42 L. Ed. 243; *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The act does not prohibit all preferences or advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable. Sec. 3, 24 Stat. 380; section 15, as amended, 34 Stat. 589.

It is contended that the allowance of the three-fourths of a cent to the owners of terminal elevators for elevation at the river constitutes a discrimination against the owners of elevators at St. Louis and points east and west of the river to whom no such allowance is made and who cannot treat the grain during this elevation in transit. But to the companies whose termini are at the Missouri river elevation in transit there is a commercial necessity for which they have a right to pay in order that they may secure their share of the transportation and the full use of their cars. For this service they pay three-fourths of a cent per 100 pounds. The owners of elevators at other places cannot render this service and cannot treat this grain at these points; but they may do both and receive the compensation and benefit thereof by constructing elevators at the termini of the railroads at the Missouri river as those have done who do receive these benefits. The difference in allowance and in advantage is the just re-

sult of a difference in location and in the natural advantages of terminal elevators and cities upon the Missouri river, and it constitutes neither unjust discrimination nor undue prejudice. The Union Pacific Company and the Chicago Great Western Company, which have no railroads at St. Louis, certainly cannot be required to give to the owners of elevators and dealers in grain there the same advantages which they bring to those at the termini of their railroads. The Supreme Court, after a review of authorities, said:

"In short, the substance of all these decisions is that railways are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge." *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 283, 12 Sup. Ct. 844, 36 L. Ed. 699; *Harp v. Choctaw, Oklahoma & Gulf R. Co.* (C. C.) 118 Fed. 169, 175; *id.*, 125, Fed. 445, 450, 453, 61 C. C. A. 405.

Railroad companies carrying wheat out of St. Louis allow for elevation at that city three-fourths of a cent per 100 pounds on grain shipped out to the south and to the southeast, and one-fourth of a cent per 100 pounds on grain shipped out to the east; but they allow and pay nothing for elevation upon grain shipped into St. Louis from the west. Complaint is made that the payment by the carriers of three-fourths of a cent per 100 pounds for elevation at Omaha and Kansas City works a discrimination between the dealer in grain who owns an elevator at St. Louis and the dealer who owns one at Omaha, in this, that if the former purchases grain west of the Missouri River, ships it through Omaha to his elevator at St. Louis, and then out to some eastern point, it costs him three-fourths of a cent per 100 pounds more at

that point than it would cost the dealer at Omaha who has passed the grain through his elevator. The answer is that the two dealers are not similarly situated. The Union Pacific Company and the Chicago Great Western Company neither reach St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation which constitute a controlling factor at Omaha and Kansas City do not exist at St. Louis, and that city is many hundred miles farther distant from the grain fields. These facts extract from this difference every element of unjust discrimination or undue prejudice. *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 12, 21 Sup. Ct. 516, 45 L. Ed. 719; *Interstate Commerce Commission v. Alabama Midland R. R. Co.*, 168 U. S. 144, 171, 175, 18 Sup. Ct. 45, 42 L. Ed. 414; *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648, 671, 674, 20 Sup. Ct. 209, 44 L. Ed. 309.

The allowance for elevation at the Missouri River points has not been made to millers who own elevators and are engaged in milling in transit there, and it is said that from this fact arises a discrimination in favor of millers at St. Louis who own elevators at Omaha or Kansas City and pass their grain through them. There is no discrimination here in favor of millers in St. Louis who have no ownership or operative control of an elevator at one of the Missouri River cities. There is no evidence that there is any miller in St. Louis who has such an ownership or control, and this suggested discrimination is too theoretical and improbable to persuade. If, however, it exists, the remedy is to grant reparation to the millers who elevate their grain in transit in accordance with the schedules of the carriers at the Missouri River points, as the Commission has done in the cases of the operators of other elevators there (*Nebraska-Iowa Grain Company v. Union Pacific*

R. R. Co. (Jan. 6, 1909), 15 *Interst. Co. R.* 90), not to forbid all compensation for elevation in transit.

This brief review of the suggestions of counsel in support of the action of the Commission discloses no rebate, no unjust discrimination, no undue prejudice—nothing that may bring the sweeping orders before us within the delegated powers of that body. On the other hand, the enforcement of these orders cannot fail to cause great losses and to entail much discrimination. It will strike down the practice of a decade in reliance upon which elevators have been built, terminal grounds in large cities have been bought and equipped, contracts have been made, business and markets have grown up, and business relations have been established. If the carriers whose roads terminate at the Missouri River cities may not pay for this elevation in transit, they must furnish it themselves free, or the producers and consumers whose grain passes over their roads must ultimately bear the expense of it. If they furnish it free, or if they construct elevators and charge a reasonable compensation for it, the owners of the terminal elevators at the river must lose the use which in large part induced their construction, and must lose a portion of their value. If the carriers charge for it, producers and consumers of grain, which on account of its origin must pass, or for other reasons does pass, over their railroads, must bear this charge, while those whose grain may pass over the through roads may be free from it, and this fact will necessarily have the effect to divert grain and the business in it from the Missouri River cities and to diminish the value of all investments therein in facilities for conducting it.

While these facts bear upon the wisdom and expediency of the orders, they are not unworthy of serious consideration in the determination of the question whether or not the power of the

Commission to affect so radically the property rights and interests of the parties to these suits really exists. The conclusion of the whole matter is that the sweeping orders under consideration were beyond the delegated power of the Commission, and for that reason they must be annulled, and their enforcement must be enjoined.

The Commission appealed from this decision of the Circuit Court; this court, in an opinion by Mr. Justice Holmes, affirmed the judgment of the Circuit Court. 222 U. S. 42. We quote from that opinion:

The ground on which the payment to owners of grain finally was held to be a rebate had been considered from the beginning, and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators own the grain put into them, they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which, although not included under the term "elevation," or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is thought to create an undue preference and unjust discrimination. Of course, the opportunities for fraud are adverted to, but the ground of the decision is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain. As was pointed out by the court below, the final order is confined to grain that has been treated, weighed, inspected, or mixed.

We agree with the court below that this decision is erroneous in its conception of the grounds on which, under the statute, an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to

advantages is recognized in *Penn. Ref. Co. v. Western New York & P. R. Co.*, 208 U. S. 208, 221, 52 L. Ed. 456, 28 Sup. Ct. Rep. 268. The law does not attempt to equalize fortune, opportunities, or abilities.

In the Federal Sugar Refining case, 20 L. C. C. 200, the Commission found, among other things, that the allowances paid by the carriers on sugar brought by Arbuckle Brothers on floats and lighters to the carriers from stations on the Jersey shore, resulted in inequalities, preferences and discriminations and were unduly prejudicial to the Federal Sugar Refining Company, a competitor in the same markets with Arbuckle Brothers, since the Federal Refining Company received no allowances for moving its sugar to the same station. The Commission was following the same principle which had governed it in the elevator cases. There are many expressions in this case similar to that used by Commissioner Harlan in the Tap-Line case. We shall not insert herein the many references in the Sugar Lighterage case to unjust discrimination arising from certain facts there recited. In the opinion by Mr. Justice Lurton this court points out that the differences which exist and which the Commission denominated as the source of undue discrimination and unjust preference, were really ones that might properly exist. Such differences as did exist arose from natural conditions. We quote from the opinion:

"That certain advantages inured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost, is obvious. That this was a consideration which operated as an inducement to

make these contracts, may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers, may also be conceded. But these were business considerations which are far from showing any purpose to give them any illegal preference or to discriminate against other shippers. That the station constituted a great public utility by which the shipping public was served is too plain for argument. Although nearly one-third of all west-bound shipments through that station were made by Arbuckle Brothers, the remaining two-thirds of the tonnage was furnished by the general public. Thus, the uncontradicted averment of the bill is that during the first six months of 1907 the shipments of general merchandise through that station numbered 92,622, of which more than 85,000 were by shippers other than Arbuckle Brothers, though the tonnage of the latter aggregated nearly one-third of the total. Thus it is demonstrated that while Arbuckle Brothers are by far the largest shippers, yet the advantages of the station are availed of by thousands of the general public.

* * * We must now recur to the distinction drawn by the Commission between the compensation paid by the railroad companies to Arbuckle Brothers for the instrumentalities furnished and the service performed by them in respect to their own west-bound shipments of sugar, and the compensation paid to them in respect to the freight handled by them through their station for the general public. The Commission find no fault with reference to the compensation paid for the latter but do find that the compensation paid for the former is an undue discrimination unless a like compensation

is made to the Federal Sugar Refining Company for the lighterage of its sugar.

We have before noticed that the order of the Commission is in the alternative. The obvious inference is that the Commission found nothing unlawful *per se*, in the compensation paid to Arbuckle Brothers under the contract, although they are compensated upon a gross tonnage which includes their own sugar, for it sanctions its continuance upon condition that a like allowance shall be paid upon the sugar lightered by the Federal Sugar Refining Company. *Penn. Refining Co. v. Railroad*, 208 U. S. 208, 218.

But, as has already been shown, the railroads were under no obligation to lighter the sugar of the Federal Sugar Refining Company. Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. *Wight v. United States*, 167 U. S. 512; *General Electric Company v. New York Central Railroad*, 14 I. C. C. Rep. 237; *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 46. In the case last cited, it is said:

“* * * the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in Section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, Chap. 309, Sec.

12, 36 Stat. 550, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

Viewing the whole case in a broad light, it is apparent that the disadvantage under which the Federal Sugar Refining Company labors is one which arises out of its disadvantageous location. That disadvantage would still remain if the title to the Jay Street station was in the railroad companies, and its business in charge of a third person.

We think it is entirely fair to the Commission to say that it has determined since Congress failed to prohibit as broadly as the Commission had recommended the participation in transportation either directly or indirectly by the shipper, that if the Commission would proceed to secure the same result by holding in all instances that unjust discrimination resulted by reason of the participation of shippers in transportation. Commissioner Prouty said in the Sugar Lighterage case, 20 I. C. C. 221:

"To permit a shipper to receive from a railroad compensation for any part of the service of transportation undertaken by the railroad is a fruitful source of favoritism and discrimination. This has always been recognized by all students of the subject, and Congress, in view of this fact, might very well have prohibited all transactions of this kind. Had it done so the mere fact that Arbuckle Brothers are the owners of a substantial part of the traffic moving through this terminal would render the operation of the contract unlawful.

Congress has not done this. The Commission in calling the attention of Congress to the wrongs which grew out of this connection be-

between the shipper and the railroad, itself stated that there might be instances in which it was for the interest of the general public that some portion of the transportation service should be performed by the owner of the property, and that, for this reason, the water was deemed to be a public use, and that the compensation paid the shipper for the performance of this service was not extravagant. Whether influenced by this opinion or not, ~~Court~~ ~~did~~, in the Hepburn ~~decision~~ ~~of 1881~~, provide that where the shipper rendered a part of the transportation service the Commission might require what would be a reasonable compensation for that service and fix a limit which should not be exceeded by the carrier. ~~Thereby~~ ~~expressly~~ recognizing the right of the shipper to employ the shipper about the transportation of his own property, provided the compensation paid for that service was not unreasonable.

The conclusion of the Commission as to unjust discrimination was made in the ~~Hepburn~~ and other ~~decisions~~ ~~and~~ and in the ~~Short~~ ~~Literary~~ ~~and~~. Identically the same result was reached in the ~~Tyler~~ ~~and~~ ~~and~~ under review. The Commerce Court held that the Commission proceeded arbitrarily and that the differences which the Commission found did not constitute in law unjust discrimination. After pointing out that many of the ~~Tyler~~ ~~and~~ ~~and~~ had received amounts disproportionate to the service rendered, and that others received no allowance for work practically identical with that performed by others, the court proceeded to say that the remedy should be accomplished not by requiring equal payments, but by requiring equality of treatment and regulating the sums to be paid. We quote from the opinion of the Commerce Court:

The power of the Commission to prevent such rebates and unjust discriminations is beyond question. It is to be accomplished, however, not by enjoining payments, which the law itself recognizes as legal, but by requiring equality of treatment and by regulating the sums to be paid, so that they will be fairly proportioned to the services rendered. That the Commission is not authorized to forbid lawful payments merely because, in its judgment, unjust discriminations result therefrom, or to declare that to be unjust discrimination which results only from a perfectly lawful payment is apparent from the case of *I. C. C. v. Diffenbaugh* (222 U. S. 42). The invalidity of the Commission's finding, when unsupported by the evidence, that certain services are plant facility and not transportation services, is also attested by the same case.

In the *Diffenbaugh* case the Commission held that on grain passing through an elevator and mixed, treated, weighed, or inspected therein, no allowance for elevation might be made to the elevator owner if he had any interest in the grain itself. The basis of the order was its determination that the elevation under such circumstances was not transportation within the act, and that an unjust discrimination resulted in favor of the elevator owner, against other grain dealers who did not have elevators, even though the payment was an honest one, limited to the bare cost of elevation, inasmuch as he obtained undue advantages by being thereby enabled to perform other services in respect to the grain. But the courts held that unjust discrimination could not be based upon a lawful and proper payment and that such a service was in fact a transportation service. Mr. Justice Holmes says (p. 46):

"The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported * * * he shall pay for them."

"The only permissive element being that the commission may determine the maximum" to be paid.

Judge Mack then refers to the decision by Judge Sanborn in the Diffenbaugh case, 176 Fed. 418, which we have already set forth fully, and proceeds as follows:

Equally may it be said that a reasonable division out of joint rates can not be denied a common carrier for transportation services because of any past or present derelictions, or even the fear of further violations of the law. The law itself fixes the method of punishment for such wrongs; it does not include therein a denial of proper compensation for proper services.

Common ownership of a railroad and an industry facilitates the making of discriminations and the covering up of rebates. For this reason Congress enacted the commodities clause, which forbids a railroad from transporting any commodity—

"manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

But Congress at the same time expressly excepts "timber and the manufactured products thereof" from this prohibition. It has thereby made it manifest that, in its judgment, the possible evils of secret rebates and unjust discriminations which might result from the common ownership of a railroad and a lumber plant do not offset the advantages that may be derived therefrom. It is clear, too, as well from the report and the evidence before the Commission, particularly the concurring opinion of Mr. Com-

missioner Prouty, as from the position taken by the State of Louisiana in this court in support of the contentions of these petitioners that these advantages are very real; that the vast forests of the country will not be developed without branch or tap lines running from the great trunk lines into the woods themselves, near which saw-mills are most advantageously to be located; and that in a large measure the capital for the construction of such branch or tap lines must be raised by those who control the forests and the mills.

Common ownership or control of a lumber mill and a railroad can not, therefore, be prohibited by the Commission or be made the basis of a denial to a railroad of rights accorded another road not so owned.

Counsel for petitioners strenuously urge that this is the real basis for the action of the Commission in classifying many of these tap lines. Despite some expressions in the report which would seem to support this conclusion we accept the Commission's express recognition of this limitation of its power and its disclaimer both in this and in later cases (see *McCloud Lumber Co. v. S. P. Co.*, 24 I. C. C. 89, 94), of the adoption of this test.

The Commission says that the payment of a division out of the joint rate upon the property of the appellee lumber companies is a rebate or departure from the published rates. It said the same thing in the elevator cases. It pronounces the service performed by the appellee railroads as not a transportation service and yet in the case of many of the appellees herein the Commission authorized the trunk line railroads to pay the shipper for transporting his product to the rails of the trunk line railroad, provided that transportation be greater than 1,000 feet and not greater than three miles. In this

connection it is interesting to note the observation of this court on this point in the case of *Mitchell Coal & Coke Company v. Pennsylvania Railway Company*, 230 U. S. 247, 264 and 265, 57 Law Ed. 1479-1480, where this court quoted from page 277 of the Commission's Tap-Line opinion, and added:

"In view of this ruling, it is apparent that lateral allowances may have been lawfully paid. They become unlawful only when unreasonable."

There is no consistency between the holding that the four appellee railroads do not perform a transportation service upon the lumber of the appellee lumber companies and the holding that various lumber companies as set forth in the Tap-line report do perform a transportation service. The circumstances of carriage in all instances are substantially similar. The Elevator and Sugar Lighterage cases conclusively dispose of the Commission's contention as to discrimination. The Act authorizes, even requires, joint rates between the appellee railroad companies and the trunk lines. There was no basis either in fact or in law for the Commission's finding in the order that the participation in joint rates by appellees results in undue and unreasonable preferences and unjust discriminations.

IV.

THE COMMISSION'S ORDER RESULTS IN UNDUE AND UNREASONABLE PREFERENCE AND UNJUST DISCRIMINATION WITHIN THE MEANING OF THE ACT TO REGULATE COMMERCE.

(a) As between common carriers subject to the Act to Regulate Commerce.

The decision of the Commission divides the 99 tap-line railroads considered in the tap-line opinion into three classes: (1) Common carriers of all traffic transported; (2) common carriers of non-proprietary traffic only, and (3) (ignoring separate organization of railroad and lumber company) allowances are given direct to the lumber company. We attach to this brief, as "Appendix A" a tabulated comparison of the various tap-lines, giving in some detail the facts as found by the Commission, together with the compensation fixed by the Commission for such services as it found under the Act to Regulate Commerce, to be entitled to compensation. We earnestly ask the court carefully to examine this tabulated statement as it shows the tap-line decision in concise form. Such an examination shows that the Commission has decided and disposed of the tap-line case without any application of a uniform principle. While the Commission announces that transportation within the meaning of the Act to Regulate Commerce extended in the yellow pine producing territory, three miles from the main line of the trunk line companies, no allowance was made to the appellees herein for services identical with that given

by the trunk line railroads within the three mile limit. In the case of the Mansfield Railway & Transportation Company, lumber is hauled three-fourths of a mile from Oak Hill to the Kansas City Southern interchange track, and two and one-half miles to the Texas & Pacific interchange track, for which the Commission expressly says no allowance may be made. The only excuse for this finding by the Commission is that the appellees had manipulated the situation in order to establish "a relation that is unlawful." There was no evidence whatever of manipulation, or of any purpose to establish any unlawful relation. At the time the switch connection with the Kansas City Southern was removed allowances were being made by the trunk line carriers direct to unincorporated railroads and to lumber companies, making no pretense of serving the public as a common carrier. The evidence expressly shows that the Kansas City Southern established the spur track for the temporary purpose, and that its maintenance at the present time would be in violation of those conditions set forth in Section 1 of the Act to Regulate Commerce governing the power of the Commission to establish switch track connections. The testimony shows that the connection could not now be made with safety to freight and passenger traffic.

To denominate the situation in the Mansfield Railway & Transportation Company case as a mere manipulation to establish an unlawful relation, is the exercise of arbitrary power for the sole purpose of denying to the Mansfield Railway & Transportation Company compensation for what admittedly in

other circumstances would be permissible, and to deny to the appellee Frost Johnson Lumber Company the right to have joint through rates established upon lumber shipped to interstate destinations. If this court will examine the decision of the Commission in the case of the Deering Southwestern Railroad, 23 I. C. C. 630, it will observe that at the time of the hearing before the Commission, the Deering Southwestern Railroad received a division of the joint rate upon the products of the Wisconsin Lumber Company for a haul of about a half mile. After the date of the hearing before the Commission, the Deering Southwestern made delivery to the Frisco at Blazer, seven miles distant from the mill. We quote from the Commission's opinion in reference to that case:

We are given to understand that the operating conditions of the branch of the Frisco connecting with this tap-line at Deering Junction is such as to make it no longer practicable to receive the lumber at that point. At the time of the hearing, it was admitted that practically the entire tonnage of the tap-line was supplied by the controlling interest and no passengers were carried. * * * For its service in hauling the products of the mill of the controlling company to the Frisco at Blazer, a distance of seven miles, we fix one and a half cents as the maximum division that may legally be paid to this tap-line out of the rate.

Why should the Commission authorize a division of one and a half cents for a haul of seven miles, necessitated only because the half-mile haul was impracticable and at the same time refuse to give the Mansfield Railway & Transportation Company com-

pensation for its three-fourths or two and one-half mile haul respectively, to the Kansas City Southern and Texas & Pacific, for the only possible haul from the mill to any railroad? The Commission refuses to permit compensation for the only possible means of outlet to market and yet in another case authorizes payment of one and a half cents per hundred pounds (\$7.50 per car of 50,000 pounds), when it was possible to make delivery within a half mile. We are not complaining of the allowance to the Deering Southwestern, for clearly that line was entitled to recognition. We simply point out this difference in treatment by the Commission, which we submit most unjustly discriminates and works an undue preference.

In the case of the appellee Woodworth & Louisiana Central the Commission declines to authorize compensation for the movement from La Moria, a distance of six miles, the movement being from the mill located at Woodworth near the Iron Mountain Railroad, while at the same time it authorizes the Red River & Gulf to receive two cents per hundred pounds for the movement from Long Leaf to Le Compte a distance of 13 miles, on the products of the mill located at Long Leaf, near the Iron Mountain. An inspection of the map discloses a complete identity of movement in the case of the Woodworth & Louisiana Central and Red River & Gulf, except as to distance.

These considerations apply with equal force to the appellee Louisiana & Pacific Railway, which is allowed no compensation for the line haul on the finished product for distances of seven and one-half

to 43 miles or for deliveries at points near the mills from three-fourths of a mile to one and one-half miles. The Victoria, Fisher & Western likewise has a haul, on the finished lumber, of 25 miles.

Numberless examples of these gross discriminations are disclosed from the Commission's opinion. We may call attention here to the cases of Arkansas Southeastern and Ouachita Valley Railroad.

In the case of Arkansas Southeastern, 23 I. C. C. 606, the Commission allows 2 cents for the movement from Randolph, Louisiana, a point on the Rock Island, to Farmersville, 28 miles away in connection with the Iron Mountain. In the case of the Ouachita Valley Railway, 23 I. C. C. 319, the Commission declines to make any allowance for a 28-mile haul from Millville, on the Cotton Belt, to Stark, on the Rock Island. The only difference in fact between the two last named railroads is that the Arkansas Southeastern, the recognized common carrier, has a passenger revenue of \$778.90, while during the same period the Ouachita Valley Railway, the plant facility, had a passenger revenue of \$764.54.

Now it can scarcely be possible that any tribunal would undertake to say that the right to participate in joint rates should be determined by the fact that passenger earnings of less than \$778.90 should be a bar, while as much or more than this amount would entitle the carrier to participate in such rates.

(b) Discrimination as between shippers.

In the case of all of the appellee lumber companies the Commission holds that joint rates may not be established upon through traffic from the mill

over the line of the appellee railroads and their trunk line connections, while at the same time it requires the application of joint rates upon the products of independent lumber companies from points on the appellee railroads over their lines in connection with the trunk lines. This gives the so-called independent yellow pine manufacturer, who ships from points along the line of any of these appellee railroads, the same rate from his mill which the appellee lumber companies must pay for the transportation from the junction point between the appellee railroads and the trunk line.

It is thus apparent that while the non-proprietary yellow pine lumber is carried to St. Louis from tap-line points at a 19-cent rate, the proprietary yellow pine must be transported at the local tariff rate from the mill to the junction point, ranging from 2 to 5 cents, and the 19-cent rate in addition from the junction, or a total of 21 to 24 cents. This prevents the proprietary lumber company and its stockholders from enjoying the facilities which have been prepared by the common owners and at the same time gives the benefit of these facilities free of cost to the non-proprietary producer. Furthermore, there is a discrimination as between shippers due to the fact that the non-proprietary producer of yellow pine lumber, several hundred miles further away from market, but situated on the trunk line, may have his lumber carried to St. Louis for 19 cents, although the transportation is much more expensive than is the transportation of the proprietary lumber from the tap-line point to St. Louis. Take the case of any one of these appellee railroads; any lumber

man may erect a mill at the extreme terminus of any one of these appellee railroads and he may have the benefit of all the investment made in these appellee railroads without paying a single cent more than is paid by the appellee lumber companies for transportation from the junction point. This discrimination is gross, unwarranted, and is in law most arbitrary and unreasonable. We shall take occasion at the argument to point out specific instances disclosed by the Commission's opinion where discriminations as between railroads and shippers exist as a result of the Commission's decision.

V.

THE ORDER DEPRIVES THE APPELLEES OF THEIR RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

It is a maxim of transportation law that a common carrier is entitled to reasonable compensation for all services which it performs. In this case the Commission denies that the service performed is a transportation service by a common carrier and thus seeks by fiat to set aside the established law applicable to common carriers. The Fifth Amendment to the Constitution of the United States provides that property shall not be taken without due process of law. The investments made in the railroad company while largely made by the same persons who are investors in the proprietary lumber company nevertheless are the property of separate individuals within the meaning of the law. In the case of some of the appellees there are several hun-

dred thousand dollars invested in the lumber company by men who have no relation whatever to the railroad and no interest in it in any way. The reverse is also true, there being large holdings in the railroad company whose owners have no interests direct or indirect in the lumber company. The action of the Commission therefore takes the property of the investors in the one instance compelling the railroad company to perform a service without reward and in the other case giving a service without charging therefor. This action of the Commission is not only unlawful, but it is destructive of good morals. The due process of law which is violated by the order of the Commission results from the failure of the Commission to comply with the provisions of the Act to Regulate Commerce. The provisions of the statute we have already set forth and it is sufficient here to say that sections one, three, six and fifteen all carry plain directions to the Commission and these directions have been violated. Section one defines the common carriers that are subject to the act and also the transportation subject to the act. Section six of the Act to Regulate Commerce requires all charges for the transportation of property subject to the act to be filed with the Interstate Commerce Commission. If there are no joint rates, each carrier must file its separately established rate applicable on the through business. If no rates have been published for a movement, the carrier is forbidden to engage in such transportation or to make the movement of property for which no tariff is published. The Commission finds that the haul by the appellee railroads of lumber produced by the ap-

pellee lumber companies is not transportation subject to the Act to Regulate Commerce; it therefore follows that no tariffs naming rates for the haul of such lumber can be filed with the Commission. Without such rates on file, the appellee railroads cannot move such lumber. We therefore have not only a denial of the right to participate in joint rates, but we have a denial of the right to participate in the haul in any wise. We may say, for the information of the court, that appellee railroads have recognized it their duty under the law to follow the mandates of the statute rather than the effect of the Commission's opinion, and have therefore exacted their local tariff charge for the movement from the mill to the trunk line connection. It is sufficient to say that the ruling of the Commission and its order in accordance with such ruling, completely destroys all rights which common carriers from the adoption of the federal constitution have enjoyed, viz.: the right to have compensation for property which is devoted to the public use. The decisions of numbers of courts heretofore cited completely demonstrate the right of the appellee railroads to be recognized as common carriers, and we believe this court will have no difficulty in reaching the conclusion that the Commission has erroneously construed the law, both statutory and constitutional.

THE CASE OF THE COMMISSION EXPRESSLY OVERLIES THE EXCEPTS CONTAINED IN THE COMMODITIES CLAUSE OF THE ACT TO REGULATE COMMERCE.

Before the Commission these arguments relied upon the provisions of the Act to Regulate Commerce known as the "Commodities Clause," referring to the intervention of that clause by the Supreme Court. We argued that the common ownership of stock in the short line railroad by stockholders in the larger company had been recognized as legal by the decision of this court interpreting the "commodities clause." When Congress was discussing the exact language to be embodied in the statute, it was familiar with the decision of the Commission and the general situation affecting industrial railroads. It was well understood that such roads participated in transportation charges upon products owned, produced or manufactured by affiliated interests. It is of course apparent that the "commodities clause" was directed mainly at the rail-owning roads of the east, but the discussion took a wide range and embraced the idea of a complete and perfect separation of the functions of a common carrier from those of all other business and pursuits. The decision of this court in the "Commodities Clause" case shows clearly that it was not intended by the "commodities clause" to prohibit a railroad corporation from transporting the products of a company in which the railroad company owns stock, and that such stock ownership gave the railroad

company no interest, direct or indirect, in the product transported.

The interests here involved are far more remote and, even without the exception of lumber and its manufactured products, we could confidently rely upon that decision as foreclosing the question of affiliated ownership in the cases of the appellees herein. A history of the "commodities clause" distinctly shows that Congress had before it definitely and clearly the very situation here under investigation, and that it was the deliberate purpose of the legislative branch of the Government to permit the continuation of the very practice here involved. The original amendment, as introduced by Senator Elkins, was as follows:

It shall be unlawful for any common carrier subject to the provisions of this act to engage, directly or indirectly, in the production, manufacture, buying, furnishing or selling of coal, coke, or any other commodity or commodities of commerce in competition with any shipper or producer on its line or lines: *Provided*, That nothing in this act shall be construed to prevent a carrier from mining coal exclusively for its own use. (See Congressional Record, May 7, 1906, p. 6620.)

This amendment was modified so as to read as follows:

It shall be unlawful for any common carrier engaged in the production, manufacture, buying, furnishing, or selling, directly or indirectly, of coal, coke or any other commodity of commerce, to engage in interstate commerce: *Provided*, That nothing in this act shall be construed to prevent a carrier from mining coal or

furnishing or producing other commodities exclusively for its own use.

Senator McLaurin (p. 6622, Cong. Rec.) offered the following substitute:

It shall be unlawful for any common carrier engaged in the production, manufacture, buying, furnishing, or selling, directly or indirectly, of coal, coke or any other commodity of commerce, to engage in interstate commerce as a common carrier of articles and commodities of its own production, mining or manufacture: *Provided*, That nothing in this act shall be construed to prevent a carrier from mining coal or producing other commodities exclusively for its own use.

It will be noticed that the substitute does not prohibit the common carrier thus engaged in the production, manufacture, and so forth, absolutely, from participating in interstate commerce, but the prohibition to engage in interstate commerce extends only to such articles of its own production.

Senator Tillman, in charge of the bill (p. 6622), after alluding to the difficulties of the situation, said:

Now, I will state some of my perplexities. This amendment deals with the three great problems: First, of monopoly—the railroad controlling coal lands and freezing out competitors who are engaged in the business as private owners. Second, it deals with the question of discrimination—preventing a fair deal between the private owner and the railroad by distribution of cars and access to market. It also deals with the more perplexing question or idea of the destruction of private rights and private interests.

For instance, suppose we should limit the en-

gaging in interstate commerce of a public carrier to the production by others, forbidding transport beyond the State line of any article which he himself was producing, what would become of that class of cases or those conditions in some region where the country is sparsely settled and where there is a great lumbering industry—that is, a great deal of lumber standing in trees? I have known half a dozen railroads in the South, in my own limited scope of view, that have been built entirely and solely for the purpose of hauling out the lumber from the swamps and backwoods to get it to market; and but for the fact that the lumbermen built their own road they absolutely would have had no market for their product.

Discussing these remarks of Senator Tillman, Senator Knox (page 6682) said:

In the first place, Mr. President, the question we are considering is how we may lay the hand of injunction upon corporations conducting a carrying trade between the States to prevent them from doing either that which the States have, by the express act of their legislatures, authorized them to do or, by a long period of acquiescence, permitted them to do.

The question of the power of Congress to prohibit commerce between the States has been passed on but once by the Supreme Court of the United States. The thing which Congress prohibited in that case was the transportation from State to State by express or railroad or by the hand of man of a lottery ticket, a thing connected with a gambling scheme, a thing which had been condemned by Congress time and time again. It had been excluded from the mails; it had been excluded from foreign commerce; and, Mr. President, the question of the power of Congress to prohibit that noxious thing was debated three times in the Supreme Court of the

United States by the court's own invitation, and then only sustained by a vote of 5 to 4. I challenge any Senator to put his hand upon a decision of the Supreme Court of the United States to the effect that Congress has the power to go within the borders of any State and lay a hand upon and stifle or crush the policy of that State as declared in its own legislation with respect to the development of its own resources as proposed by this amendment.

Take for illustration the State of North Carolina, rich in timber, possibly not so wealthy in capital as some of her neighbors. It is her laudable ambition that her timber shall be brought to the markets of the world; that her borders shall be filled with the industrious men who are to be engaged in that enterprise. She invites capital to come within her borders for investment. She gives by charter the privilege to a lumber company to accumulate a large area of timber land, the extent of which she may circumscribe. She permits the people who invest their money upon her hills to build highways into the forest in order that the lumber may be carried out and put into the channels of interstate and foreign commerce.

Does any Senator mean to say that it rests in the power of Congress, under the Constitution, to reverse that policy? If so, I should like to see the authority upon which it rests. Congress may, I think, without question provide that a carrier which is lawfully engaged within the borders of a State which created it in developing the resources of that State and which seeks unlawfully to gain an advantage in interstate commerce over its competitors in that particular product shall be excluded from participating in interstate commerce with respect to that product.

Congress can prevent a carrier from stifling competition by refusing to give cars, facilities

in the way of side-tracks, and other facilities. Congress can, with absolute certainty, in my judgment, prohibit a carrier from entering into interstate commerce in respect to particular traffic if it is trying to crush out its rivals. But, Mr. President, to say that Congress can cancel the policy of any State in respect to the development of its resources by prohibiting the agencies of its creation from commercial intercourse upon equal terms with citizens of other States is to say that which I think is impossible; and I entirely agree with the legal conclusions that have been so clearly announced upon this subject by the Senator from Colorado.

It must not be forgotten that during all of these discussions the evil sought to be remedied was the ownership of the products transported by the railroad company, as such, as it does not seem to have occurred to any member of the legislative branch that it was the intention of Congress to enact a law which would practically prevent a citizen of any state from owning stock, both in an industrial and a railroad corporation. Later on, Mr. McLaurin withdrew the amendment above quoted, and offered the following substitute:

It shall be unlawful for any corporation that mines or manufactures or produces any article or commodity of commerce for sale to engage in the business of interstate commerce as a carrier of its own products, mining, or manufacture; and it shall be unlawful for such corporation to charge, demand, collect or receive any money or other thing for the carriage, as a carrier of interstate commerce, of any of the like kind of articles or commodities produced, mined or manufactured by any other person, company, or corporation; and for a violation of this provision the person paying such charge or demand

may recover in any State or Federal court having jurisdiction of the subject matter an amount triple the amount so collected or paid, together with all costs of collection, including attorney's fees, and costs of travel to and from the attendance upon court. If any such corporation shall engage in the business of a common carrier of such articles or commodities as intrastate carrier, it shall be unlawful for such corporation to engage in interstate commerce as a carrier of any kind of commerce.

Discussing these propositions, Senator Bacon (Cong. Rec., May 8, 1906, p. 6685) says:

That is an extremely difficult question, and it is one which not only will affect illegitimate enterprises, if I may so denominate them, but it is one which will affect legitimate enterprises, and therefore it should be regulated with great care, so as not in any manner to do unwanted injury to those legitimate enterprises.

I will give an illustration. Of course, in these matters the fact that it will affect industries in our particular localities naturally occurs to Senators. The Senator from Pennsylvania instances the case of the lumber trade in North Carolina and that is true also in the State of Georgia. The southern half of the State of Georgia is a timber-producing section. Very many railroads have been built in that section for no purpose except to develop the timber industry. Men owning large tracts of timber land remote from railroads have built railroads into those tracts of land for the purpose of being able to market the timber. After they had built the railroads, while they are engaged primarily and principally in the transportation of timber which they themselves cut, they also take some business from the public in the way of the carrying of passengers and freight, and however minor it may be compared with the main

business of carrying the timber, it constitutes them as common carriers.

While it is true that those roads are located within the State entirely, beginning in the State and ending in the State, still when a railroad takes a shipment from a point within the State to a point out of the State, a part of the transportation to be effected through other carriers, it constitutes itself a corporation engaged in interstate commerce, and becomes subject to the provisions of this bill.

On the same day the Senator from North Carolina, Senator Simmons (p. 6740) said:

If we should adopt the amendment proposed by the Senator from West Virginia, I fear the effect would be to greatly embarrass and cripple certain important enterprises in my State—railroad building and manufacture of lumber. There is, as I will show later, a very important connection between these in my State at this time.

I have no doubt that there are great evils growing out of the conditions which exist in Pennsylvania, Ohio, Illinois, and West Virginia, by reason of the fact that some of the railroads in those States are also the owners of many of the coal mines and that they are operated conjointly. There is a just and powerful public sentiment that these evils should be remedied. But there is, I think, no demand for hasty or immature legislation.

The Senator from Pennsylvania has alluded to the conditions in my State. I do not refer to them for the purpose of using them as an argument against the proposed amendments, but for the purpose of showing what might be the effect upon these conditions if the amendment proposed by the Senator from West Virginia, for instance, should be adopted. There is today in my State an era of railroad construction.

That is especially true in the eastern section of the State, and the great pine-tree region of the State. Nearly every railroad that is today in process of construction in that section of the State is being built by corporations that are interested in the manufacture of lumber. They have bought immense tracts of timber lands; they have built great plants upon those lands, and they are now constructing railroads to and through them. Nearly every one of these railroads has its basing point outside of the State of North Carolina. The timber does not lie upon streams. The most of that has long since been cut. The timber that remains is in the interior, so to speak. It can only be reached by railroads. In some instances the railroad would be worth but little without the timber, and the timber but little without the railroad. There are at least 200 miles of railroad being constructed in my State today, much of it to develop timber lands owned by those who are building them, and the market for all that timber is outside of the State, making this interstate business.

Senator Clark (May 9, p. 6758), after adverting to the coal situation in the East, said:

Now, Mr. President, that is the evil you want to deal with here. You do not want to deal with a proper road. You do not want to deal with a railroad that has been built to carry lumber from the forest to any community, because there has been no question here of its improper use that I know of. It may be that we ought to adopt a general system that no public carrier engaged in interstate commerce shall engage in anything else, but to do that you must wait and take time, and it must be done carefully and in such way that the interests which are already involved and legally involved, the money already invested according to law may be properly protected.

I doubt very much, Mr. President, whether you can do that with all the different interests unless you shall confine this to one or two articles. If the evil is so great touching coal—and I do not know but that it is—then it would be well to put a stop to it by dealing with that subject alone, dealing with the other subjects as the complaint arises as the opportunity is presented.

Mr. President, I fear myself, as do the Senators from Montana, that a sweeping provision of this character may materially affect the industries of the great West. We have had a hard time to settle up the West. We are in a very prosperous condition today, and I believe as a general rule there is not much complaint in the great West against railroad companies engaging in commerce or anything of this kind. As a rule they do not. There may be some exceptions where they are engaged in such production and distribution as ought to be prohibited, but the vice of their production and distribution is not the production and distribution but the abuse they make of it by attempting to avoid and get rid of the statute which declares that they shall publish their rates and adhere to their rates. Punish them, Mr. President, if they do not adhere to the rates. Punish them in some way if they engage in interstate commerce, and then make that an excuse for an undue and unjust competition on their part. If they by that system select a man to whom to sell and give him a price they do not give to somebody else, or if they go into the market and buy articles and transport them and give the seller an opportunity they do not give somebody else, that is a violation of existing law, a law the Supreme Court of the United States says is sufficient now to deal with it; but if it is not, we might readily amend it in that particular and leave these other questions until such time as

we shall have an opportunity to do so with less danger of doing something out of the way.

Thereafter, on the same day (p. 6758), Senator Fulton, discussing the same amendment, says:

All over the West, as the senator from Colorado has said, there are little railroads which have been built to connect with coal mines and saw-mills, that have been built simply to get the product from the mills and the mines. In such cases mining and milling are the principal enterprises. The railroad is merely incidental thereto and yet those railroads connect with interstate lines or with other railroads connecting with trans-continental or interstate lines. Hence these small roads doubtless would be held to be engaged in interstate commerce. It seems to me, Mr. President, that a distinction should be made and that proper exceptions should be provided in any legislation that shall be enacted on this subject in order to protect such enterprises. Just what those exceptions should be and just how they should be framed I am not prepared at this moment to say, and it does not seem to me that any other senator is prepared to say. * * *

I know of railroads which have been built to coal mines for the sole purpose of developing them. If this amendment shall become a law, the owners of such will be compelled either to dispose of the mines or of the roads, and neither would be of any value without the other.

It is my conviction that legislation of this character should be directed against those transportation lines only that are engaged principally in carrying interstate commerce, and with which mining or other enterprises are merely incidental. It ought not to be applicable to those carriers with whom railroading is merely incidental to the business of their mills or mines. I think senators will generally agree with me on that proposition. * * *

Consider the effect of the proposed legislation

on one of the small railroads out West, of which I have spoken, having, we will say, a coal mine in the State of Idaho and a railroad extending therefrom into Washington or Oregon. Such a railroad would be in interstate commerce line and subject to the prohibitions of the amendments which have been proposed here. This legislation would ruin all such industries and deprive thousands of men of employment. Yet they are offending against no men; they are doing no person and no community an injury or an injustice. They are necessary to and powerful factors in the development of the resources of the great West. Shall they be stricken down simply because we realize that there are great evils elsewhere which we wish to remedy? Is it necessary to destroy the good in order to correct and restrain the evil? Why must we indulge in this hasty and ill-considered legislation? * * * Let whatever measure which shall be adopted be carefully considered and the proper and necessary exceptions made.

The amendment offered by Senator Elkins, which was adopted in the Committee of the Whole, read as follows (p. 7224):

From and after May 1, 1908, it shall be unlawful for any common carrier to transport from any state, territory, or district of the United States to any other state, territory or district of the United States or to any foreign country, any article or commodity manufactured, mined or produced by it or under its authority or which it may own in whole or in part, or in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary or used in the conduct of its business as a common carrier.

Senator Tillman, on May 17 (p. 7220), offered in lieu of this the following:

After May 1, 1908, it shall be unlawful for

any common carrier to engage in the transportation of interstate commerce, if such common carrier shall at the time be interested, directly or indirectly, *by stock ownership or otherwise*, in the article or property which is the subject matter of such commerce, or if it be interested at the time, directly or indirectly, *by stock ownership or otherwise*, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee, of such common carrier be interested, directly or indirectly, *by stock ownership or otherwise*, in the business of buying or selling such article or property which is the subject matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such common carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject matter of such commerce, or in the mines or factories producing the same.

This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees, or stockholders.

The amendment, which was directed at the question of common-stock ownership in a railroad and an industrial enterprise, was defeated (p. 7222). Discussing it, the senator from Washington, Mr. Piles (p. 7222), said:

Mr. President, if it is in order, I should like to make a few remarks in reference to this amendment, as it would destroy practically every industry in the State of Washington if it should be adopted. I reserved the right to offer to this paragraph of the section when the bill reached the Senate an amendment providing that it shall not have application to timber or the manufac-

tured products thereof. I might just as well present the amendment now, and my remarks with reference thereto, if it is proper. I move to amend the section, in line 4, page 6, after the word "Commodity," by inserting "other than timber and the manufactured products thereof."

Then occurred the following colloquy:

THE PRESIDENT PRO TEMPORE: The senator cannot offer the amendment now.

MR. FILES: I will discuss the question anyway.

MR. TILLMAN: I will say to the senator from Washington that, so far as I am personally concerned, I am perfectly willing and anxious to except any industry. I mentioned the other day that there were lumber roads that had been built by the owners of the trees, and unless they had been allowed to build their own railroads, the lumber would never have gotten to market. I am perfectly willing to except lumber and its products. . . . I am after coal and coke, two of the necessities of life.

Senator Files then continued as follows:

Mr. President, I know, for instance, in my own home city, in the early history of that country, the people turned out en masse for the purpose of constructing, or aiding in the construction, of a little line of railroad—which is now some 38 miles in length—to the coal mines, in order that they might have some product to send to market and get ready money into that new country. That road exists today, and to my personal knowledge its stock is or was, owned by another transportation company. It is run in connection with the steamship line, and it carries freight and passengers for hire for the people living along the line of the road. But the transportation of outside freight is a mere incident to its business. The principal business of that road is to carry the coal mined by its stock-

holding up in the legislation given to the City of Seattle, and there it is transported by steamers to California and other domestic ports where it is sold. That steamship line is indirectly, at least, interested in that railroad. Is it the intention of Congress to put that railroad out of business? Is it the intention of Congress to put that steamship line out of business? I think not.

But let me go one step further, Mr. President. In the development of the great Pacific northwestern country we have opened up the most magnificent forests in the world. We have done it by building great logging railroads into the forests. We are not logging in that country with horses or oxen or even. We are logging by means of railroads. These railroads running from 5 to 40 or 50 miles back into the forests, necessarily penetrate the valleys. People to a certain extent have settled in these valleys and have builded for themselves homes. Their little freight, as a matter of accommodation more than anything else, and some passengers, are carried by the logging railroads. These logging roads own saw-mills on the water, or the mill companies own the logging roads. The roads take the timber to the saw-mills, where it is sawed into lumber. The mill companies own their own schooners, both steam and sail. When the timber is sawed into lumber it is transported on these schooners to all parts of the maritime world.

If, then, these little logging roads can not own stock in the saw-mills, or the mill companies can not own stock in the logging roads or own such roads outright, the great lumber industry, which employs in the woods 20,000 men alone, and which employs in the woods and in the mills and in the various industries connected with the manufacture of lumber in the State of Washington alone, upwards of a hundred thousand men, and has an annual pay roll of something like \$50,000,000, will be seriously retarded if not

wholly destroyed. * * * I protest in the name of the great Pacific Northwest against the injustice that is about to be inflicted upon these people, and I hope the Senate will not permit the amendment to prevail.

On page 7224, same date, Senator Piles moved that the amendment be amended by inserting after the word "commodity" the words "other than timber and the manufactured products thereof," and this amendment was adopted. The bill, as thus amended, was sent to the conference committee and, on June 2 (p. 8009), the conference committee in its report recommended that the Senate recede from its amendment inserting the words "other than timber and manufactured products thereof," the Senate conferees agreeing that the Senate recede. The conference committee report being presented to the Senate, this particular amendment came again under discussion, and Senator Piles, on June 6 (p. 8162), said:

Mr. President, I desire to express the hope that the conference committee will retain in this bill the amendment excepting timber and the manufactured products thereof from the provision which prohibits the carriage in interstate and foreign commerce of any article manufactured or produced by a carrier. When I had the honor to propose the amendment I took occasion very briefly, as I shall now, to explain to the Senate my reasons for the amendment.

I regret exceedingly that the conference committee saw fit to yield to the House conferees on that point. As I understand, the reason which prompted the senator from West Virginia to introduce the amendment prohibiting such carriage was because interstate carriers owned coal mines along their lines of road, and that those carriers were furnishing to their own coal mines cars, thereby preventing the independent coal

operators from competing with them successfully in the market, because the carriers would not furnish the independent operators a sufficient number of cars, although the former had plenty of cars with which to haul the coal which they were engaged in mining. If that was the object, so far as it relates to my section of the country, it will be a detriment instead of a benefit on that point alone.

As I said the other day, Mr. President, the lumbermen of the State of Washington by means of their logging roads and steam and sailing schooners are carrying to all parts of the world the products of the forests and their sawmills, I think the greatest in the world.

These people are not engaged, strictly speaking, as common carriers, while they are such undoubtedly under the law. But there are now, I suppose, in the neighborhood of a thousand (?) cars of lumber west of the Cascade Mountains, and certainly that number west of the Rocky Mountains which cannot be transported over the mountains for lack of motive power. These lumbermen in my section of the country went into the business on the lines in which they are now engaged with rail and schooner for the express purpose of getting their product to market, which they could not get to market because the railroads were unable to furnish them a sufficient number of cars and sufficient motive power to take their products to market.

These people have engaged in this business, having provided their own means of transportation, by which they transport the lumber of the Pacific to the Atlantic coast, and to all parts of the world, which cannot be transported in cars for the reasons I have stated, and which, in a large degree, had had a tendency to give a reasonable rate by which they could put their products upon the eastern market. It seems to me that Congress ought not to pass any law which would in any way prevent them from getting their product to market or to pass any law which

would compel those people through some subterfuge, to organize some company different from that which they are now operating, or to organize a number of companies for that purpose, but that they ought to be encouraged in the great business which they have undertaken.

I do not want to take the time of the Senate in discussing a question which I discussed only a few days ago. I do hope, and I felt it my duty to say it, that the Senate conferees, when they go back to reconsider the report, will stand firmly by this amendment which was inserted in the bill.

The senator from Oregon, Mr. Fulton, on June 7, 1908, discussing the amendment offered by Senator Piles, said:

I want to call the attention particularly of the conferees to the importance to the people of the Northwest in particular, of preserving and retaining the amendment that was offered by the senator from Washington, which excepts from those prohibited articles which interstate commerce carriers may transport, they being interested in the production thereof, timber and the manufactured products thereof.

The senator from Texas yesterday said that if there is any one article which these carriers should be prohibited from engaging in the manufacture of it is the article of timber and the manufactured products thereof. His argument was based upon the fact that the timber supply of this country is being rapidly depleted. That is true, Mr. President, but it does not follow by any means that the mature timber that is going to waste in the forests should be allowed to go to waste and should not be manufactured simply because the timber supply is not as great as it formerly was.

In the forests of the Northwest there are billions of feet of lumber in mature trees which if not converted into some article of use will pass

into decay and will be lost entirely. The fact that we permit the lumbermen to prosecute their business does not in the least prevent or hinder us from providing for re-foresting the timber lands and for providing for a new and wider growth of timber.

So I submit that the proposition urged by the senator from Texas is not one that may properly be considered in this connection. One of the great sources of wealth at the present time of the Northwest, and particularly in the States of Oregon and Washington, is its forests. If you shall deprive us of engaging in the industries incident thereto, Mr. President, you strip us at once of one of the greatest resources we have, and the effect of this provision will be to do exactly that. * * *

Now, Mr. President, if we shall fail to insist on the amendments of the senator from Washington, the result will be this: In the great forests of the Northwest under present conditions, logging camps cannot be profitably carried on without railway connections in many instances. Railways have to be built in connection with such enterprises in order to bring out the timber. These railroads are usually only a few miles long, but many of them serve the people of the vicinity as common carriers. However, the real primary purpose of such railroads is to serve the logging camps in connection with which they are constructed.

They connect in many cases with the trunk lines, or they come down to the great waterways, such as the Columbia River and Puget Sound. They therefore become interstate commerce carriers, and under the provisions of this amendment, unless you adopt the exception proposed by the senator from Washington, they will be prohibited from operating such roads for the purpose of carrying out the products of their logging camps.

The same rule applies throughout the Northwest also to coal mines. There are a very few

coal mines in the Northwest that are developed, except in connection with the railroad lines. That which applies to coal mines and timber is true also of copper mines, iron and other mines.

Mr. President, what good reason is there for prohibiting our people from thus engaging in the development of the industries of the country? There is a great evil that we are seeking to remedy. We all understand that in the anthracite region there is an existing and a really great evil that we wish to exterminate, but cannot that be remedied without striking down legitimate and proper industries?

It seems to me that the Senate of the United States ought to be able to correct the evils that we know of and yet preserve the industries that we all understand and admit are proper and legitimate and desirable.

Why should the man developing a mine in the Rocky Mountains, finding it necessary in the course of that development to build a railway leading down to a trunk line, be prohibited from doing that simply because we want to correct an evil in some other section of the country, which we can correct without depriving him of that necessary facility?

Senator Bailey, of Texas, opposed the amendment upon the ground that there should be an absolute divorce and separation of the business of a common carrier from business of any other character whatsoever. The statements and questions of this senator, however, would indicate that where the lumber company and the railroad company were separate corporations, that the amendment even in its original form would not apply. He states (p. 8209) :

The Senator would argue as though we are interfering with the industries of people. He is mistaken. We propose to interfere with no proper and legitimate industry. We simply

say that a corporation organized for one purpose, engaging in other purposes, shall be denied the right to engage in interstate commerce. If the railroad is a common carrier, then it is not a manufacturer, and ought not to be.

I am aware that in some of the older states railroads have been chartered with special rights to produce and transport coal, but I doubt if a charter has been granted in any state of the American Union for many years which confuses the functions of a common carrier and the functions of other branches of industry.

It is clear from this statement that the Senator from Texas was of opinion that the commodity clause in its original form, without the amendment offered by Senator Piles, applied only to those cases where the railroad company owned the timber or lumber directly and that it would not apply to a case of stock ownership in the same individuals of the stock of two independent companies. Senator Fulton therefore said (p. 8210):

There is not a single great railway line that is engaged in the lumber business, but all of the railroads that are engaged in connection with such business are little lines, built by private individuals, leading up through some little valley, 5, 10 or 20 miles in length.

And the Senator from Minnesota (Mr. Clapp) suggests to me, these short railroad lines are simply incidental to and a part of the equipment of the main enterprise—simply adjuncts thereto; and yet they lead down to navigable waters, such as Puget Sound and the Columbia River, and connect there with vessels which take the products of the mills, or else they connect with some trunk line or railroad, which carries the products of the camp or mill to market.

Senator Bailey then asked this question (p. 8210):

I should like to inquire if it is not true in the State of Washington and in the State of Oregon that the people who have obtained railroad charters and condemned the property of private citizens are not really conducting private business?

To which Senator Fulton replied:

The Senator is very much mistaken if he thinks they are not subserving the public interests at the same time. Take, for instance, a little railroad line I have in mind, that is about five miles long, I think, running back from the Columbia River in the State of Washington. True, it is a common carrier, but it practiced no deception in getting the rights of a common carrier, because it serves the people of that little valley; it takes the products of their farms down to tidewater, so that they can place them on board ship.

It is a great accommodation and a great benefit to the people of that valley; but the main purpose in constructing the road was to enable the owners to get their own logs to market. If some one will tell me why that industry should be destroyed and why they should be prohibited from operating these few miles of railway, I will be pleased to hear the reason; but I have not yet heard it suggested by any person. • •

If this amendment be enacted as it stands, it means the destruction of many industries now in operation; it means retarding seriously the development of the vast area west of the Rocky Mountains for many years to come. "Oh," some say, "you can prevent this by incorporating two companies, one a railway line and the other the logging, lumbering, or mining company."

Mr. President, we ought not to drive people into indirection in order to defeat or circumvent the law. I do not know whether they could defeat it or not by resorting to such expedients;

but we ought not to enact legislation that must drive people to subterfuges such as that in order to operate industries that are important to great communities and to the public at large.

I trust that the conferees will take into consideration the death blow which they will deal to many industries of the West if they consent to disagree to the amendment of the Senator from Washington. I hope it will be retained in the bill.

The bill having been sent back to conference, the House withdrew its objection and the amendment offered by the Senator from Washington remained in the bill, the conference report being adopted by both Houses.

We have made these extended references to the congressional debates for the reason that it removes every vestige of doubt from the proposition that Congress investigated and debated every proposition now urged against these lines. It is, of course, a debatable question whether public policy demands the complete severance of interests between transportation and industrial lines. This, however, belongs to the legislative department of the government and after full and able debate, timber and its manufactured products were exempted from the commodities clause.

These debates show beyond the peradventure of a doubt:

1. That it was the intention of Congress to permit railroad companies *per se* to own and transport timber and its products.
2. It was the legislative construction of the commodities clause in its original form, before the ad-

dition of the amendment exempting timber and its manufactured products, that the ownership by a railroad corporation of the stock of a timber or lumber company did not come within the purview of the clause as originally adopted.

3. That in the view of those who carried to the extreme limit the theory of a divorce between transportation and industrial interests the common ownership of stock by individuals in a lumber corporation and a railroad corporation transporting its products, did not come within the meaning of the commodities clause even before the adoption of the timber exception.

4. The exact situation which was before the Commission in these cases was before Congress which had in mind distinctly the cases of roads constructed primarily for the development of timber holdings, and upon which business for the public was more or less of an incident. That by the adoption of the "commodities clause" Congress determined not to deny a carrier the right to engage in interstate commerce in the production or transportation of the products of timber. With this legislative history illuminated by the views of this court, we respectfully submit that the question involved in these cases has received definite and final settlement and that there does not exist in the Interstate Commerce Commission power to forbid that which the Congress of the United States expressly permits to be done. The Commission in these cases has held to be the law not that which Congress enacted, but that which Congress refused to enact. The Commission has legislated and has practically enacted into law,

an amendment to the commodities clause in effect prohibiting the common ownership of the manufacturing or producing company and a common carrier railroad company. The true public policy to be served, it seems to us, is the reasonable regulation of the charges of all railroads for the transportation performed. There can be no doubt that where the traffic transported is owned by the owners of the railroad that the closest scrutiny should be made of all charges for such transportation. What the Commission should have done in these cases was to recognize the right of the appellee railroads to participate in joint rates upon lumber and other forest products produced or shipped by the appellee lumber companies to interstate destinations and should have confined its activities to a restriction of the division of those rates to what is just and reasonable for the services performed.

This brief has already reached more than the maximum permitted in ordinary cases. Our excuse for the extent of this brief is the magnitude of interests involved. A conservative estimate of the loss to our clients is a million and a half to two million dollars per annum. In addition, there are the great public interests which depend upon the development of the territory through which these tap-lines extend. The Railroad Commissions of Louisiana, Arkansas, Alabama and Mississippi have entered their protests against the action here sought to be reviewed. In no case which the Commission has considered and disposed of, has it by sheer fiat of opinion so affected vast investments, so interfered with future development, as in the tap-line case. The Commission has recommended to Congress certain legisla-

tion. That recommendation was acted upon unfavorably, but by its decision the Commission has gone further than mere legislative enactment could possibly have extended.

We look with confidence to the judicial determination of what the law is. In that determination our clients must, of course, acquiesce. Chaotic conditions now exist in all the yellow pine producing territory. The order of the Commission should be set aside, a correct interpretation of the law should be made so that the Commission, as well as all parties in interest, may know the limit of administrative interference with lawful investments and lawful operation of railroads. All the wrongs which the Commission found throughout the scope of its investigation, could have been removed and remedied by the exercise of careful judgment in fixing the earnings of the appellee as well as other tap-line railroads. The wrongs and injustice which the Commission's decision has wrought upon these vast interests might have been avoided by such a course of action by the Commission. These injuries have been suffered. But the future is of vastly more importance than the past. We therefore respectfully submit our case, confident that out of the present unjust and chaotic condition there may be pointed a way which will restore confidence and make it possible for further railroad building to be had in the southwest, at the same time protecting all legitimate rights of the public.

Respectfully submitted,

H. M. GARWOOD,
W. R. THURMOND,
L. M. WALTER,
Solicitors for Appellees.

Name	23 I C C Rep. Page	Status	When Incor- porated	Capital Stock
Alabama Cent. R. R.....	647	Common Carrier	1906	\$100,000.00
Angelina & Neches River R. R.....	337	Plant Facility	1900	55,000.00
Arkansas & Gulf R. R.....	303	Plant Facility	1905	Not Shown
Arkansas Eastern R. R.....	309	Plant Facility	1907	112,000.00
Arkansas Southeastern R. R.....	606	Common Carrier	1904	
Bearden & Ouachita River R. R.....	308	Plant Facility	1904	28,000.00
Beirne & Clear Lake R. R.....	307	Plant Facility	1909	
Bernice & Northwestern Ry.....	330	Plant Facility	1908	
Black Bayou R. R.....	323	Plant Facility	1904	50,000.00
Blytheville, Burdette & Miss. River R. R.....	310	Plant Facility	1906	140,000.00
Blytheville, Leachville & Ark. Sou.....	565	Plant Facility	1908	
Bodcaw Valley Ry.....	324	Plant Facility	1904	67,000.00
Brookings & Peach Orchard R. R.....	312	Plant Facility	1908	6,000.00
Butler County R. R.....	628	Common Carrier	1905	163,500.00
Caddo & Choctaw R. R.....	571	Plant Facility	1907	100,000.00
Cairo Northern R. R.....	626	Common Carrier	1906	100,000.00
Central Ry of Ark.....	582	Common Carrier	1906	2,600,000.00
Crittenden R. R.....	577	Common Carrier	1905	150,000.00
Deering Southwestern Ry.....	630	Common Carrier	1903	400,000.00
De Queen & Eastern R. R.....	581	Common Carrier	1900	600,000.00
Doniphan, Kensett & Searcy R. R.....	562	Common Carrier	1906	
Dorcheat Valley R. R.....	331	Plant Facility	1905	75,000.00
Eldorado & Wesson R. R.....	559	Common Carrier	1904	
Enterprise Ry.....	320	Plant Facility	1903	
Fernwood & Gulf R. R.....	637	Common Carrier	1906	10,000.00
Fordyce & Princeton R. R.....	315	Plant Facility		42,000.00
Louisiana & Pacific Ry. Co.....	591	Plant Facility	1904	200,000.00
Mansfield Ry. & Transportation Co.....	587	Plant Facility	1881	77,300.00
Gulf & Sabine River R. R.....	589	Common Carrier	1906	100,000.00
Red River & Gulf R. R.....	608	Common Carrier	1905	101,000.00

Line No.	Capital Stock	Bonded Individuals	Stock Ownership	Name Proprietor, Mfr.	Mileage	Equipment	Tractor Allowed	Tractor Type	Tractor Year	Tractor Make	Tractor Model	Tractor Description
206	\$130,000.00	No	Proprietary	Windsor Lbr. Co.	1	11 tons, 1 Pass. Car	Yes	87	Yes	Ill. Cent.	Ill. Cent.	Ill. Cent.
200	55,000.00	No	Same as Prop. Co.	Anglin County Lbr. Co.	30	11 tons, 1 Pass. 12 Wtr. Cars	No		Yes	Ill. Cent.	Ill. Cent.	Ill. Cent.
205	Not Shown	No	Same as Prop. Co.	Kimball Lbr. & Mfg. Co.	1	11 tons, 1 Pass. 12 Wtr. Cars	No		No	Ill. Cent.	Ill. Cent.	Ill. Cent.
207	112,000.00	No	Proprietary	Baker Lbr. Co.	1	11 tons, 30 Wtr. Cars	No		No	Ill. Cent.	Ill. Cent.	Ill. Cent.
204		No	Same as Prop. Co.	Sunbelt Lbr. Co.	1	21 tons, 1 Pass. 18 Wtr. 12 Wtr. Cars	No	87	Yes	Ill. Cent.	Ill. Cent.	Ill. Cent.
204	28,000.00	No	Same as Prop. Co.	Cotton Belt Lbr. Co.	1	21 tons, 1 Pass. 30 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
208			Proprietary	Pearl Lbr. Co.	1	21 tons, 22 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
208			Same as Prop. Co.	Barnes Lbr. Co.	1	21 tons, 4 Pass. 64 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
204	50,000.00	No	Same as Prop. Co.	Seaboard Lbr. Co.	1	11 tons, 25 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
205	140,000.00	100,000.00	Same as Prop. Co.	Three States Lbr. Co.	1	11 tons, 10 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
208				Chicago Mill & Lbr. Co.	1	11 tons, 80 Wtr. 2 Cars, 1 Tractor, 2 Cabs	No	87	Yes	Ill. Cent.	Ill. Cent.	Ill. Cent.
204	67,000.00		Proprietary	Four Seasons Lbr. Co.	1	11 tons, 4 Tr.			No	Ill. Cent.	Ill. Cent.	Ill. Cent.
208	6,000.00		Same as Prop. Co.	Quadrant Lbr. & Mfg. Co.	1	11 tons, 4 Tr.			No	Ill. Cent.	Ill. Cent.	Ill. Cent.
205	165,500.00		Proprietary	Brainerd Lumber Co.	1	21 tons, 12 Pass. 3 Cabs, 80 Wtr.	61,300.00	Car	Yes	Ill. Cent.	Ill. Cent.	Ill. Cent.
207	105,000.00		Same as Prop. Co.	Cable River Lbr. Co.	1	11 tons, 18 Wtr.	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
206	100,000.00	No	Same as Prop. Co.	Starr-Walton Lbr. Co.	1	21 tons, 1 Pass. 12 Wtr. Cars	28,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
206	2,600,000.00		Proprietary	Pt. North Lbr. Co.	1	11 tons, 1 Pass. 12 Wtr. 10 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
205	150,000.00		Same as Prop. Co.	Cherokee Lbr. Co.	1	21 tons, 15 Wtr. 12 Wtr. Cars	12,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
205	400,000.00		International Lbr. Co.	Windsor Lbr. Co.	1	11 tons, 1 Pass. 12 Wtr. 12 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
200	600,000.00		Same as Prop. Co.	Durbin Lbr. & Coal Co.	1	11 tons, 12 Wtr. 74 Wtr. 20 Wtr. Cars	61,300.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
206			Same as Prop. Co.	Doughton Lbr. Co.	1	21 tons, 21 Wtr. 2 Cabs	12,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
205	75,000.00		Same as Prop. Co.	Peter-Walker Lbr. Co.	1	11 tons, 60 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
204			Proprietary	Edgar Lbr. Co.	1	11 tons, 1 Pass. 12 Wtr. 12 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
203			Proprietary	Enterprise Lbr. Co.	1	11 tons, 71 Wtr.	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
206	10,000.00	125,000.00	Proprietary	Fernwood Lbr. Co.	1	11 tons, 12 Pass. 10 Wtr. Cars	12,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
	42,000.00		Proprietary	Ford Lbr. Co.	1	11 tons, 4 Wtr. 67 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
204	200,000.00	562,300.00	Same as Prop. Co.	Hudson River Lbr. Co.	1	11 tons, 12 Wtr. 12 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
				King-Edgar Lbr. Co.	1	11 tons, 12 Wtr. 12 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
				Longville Lbr. Co.	1	11 tons, 12 Wtr. 12 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
				Calumet Long Leaf Lbr. Co.	1	11 tons, 12 Wtr. 12 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
201	77,300.00		Proprietary	Four Seasons Lbr. Co.	1	11 tons, 1 Pass. 12 Wtr. Cars	No	87	No	Ill. Cent.	Ill. Cent.	Ill. Cent.
206	100,000.00	300,000.00	Proprietary	Gulf Lbr. Co.	1	11 tons, 12 Pass. 65 Wtr. 10 Wtr. Cars	11,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
205	165,000.00		Same as Prop. Co.	Chicago Lbr. & Coal Co.	1	11 tons, 12 Pass. 4 Tr. 12 Wtr. Cars	12,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.
				Crowell & Spencer Lbr. Co.	1	11 tons, 12 Pass. 4 Tr. 12 Wtr. Cars	12,000.00	Car	47	Yes	Ill. Cent.	Ill. Cent.

Division Allowed	Proportion Proprietary Tonnage to Total	Passenger Service	Trunk Line Connections	Junction Points	Distance Proprietary Mill to Junction Points	Total Tonnage	Gross Revenue	Net Revenue	Files, Reports Tariffs
1½c	85%	Yes	Ill. Cent.	Jasper	Ala. 7 Miles		13,294.75		Yes
No		Yes	Frisco.	Jasper	Ala. 7 Miles				
No		No	Nor. Ala. Ry.	Jasper	Ala. 7 Miles				
No		No	Cotton Belt.	Keltys	Tex. 300 Feet				
2c	96%	Yes	H. E. & W. T.	Prosser	Tex. 3 Miles				Yes
No		No	St. L. I. M. & S.	Kimball	Ark. 7 Miles				
No	95%	No	Frisco.	Turrell	Ark. Junction Point				No
No	95%	No	St. L. I. M. & S.	Farmersville	La. 28 Miles	73,171			
No	95%	No	C. R. I. & P.	Randolph	La. 150 Yards				
No	84%	No	Cotton Belt.	Best	Ark. Junction Point	58,000			Yes
No		No	St. L. I. M. & S.	Beirne	Ark. ½ Mile				Yes
No	100%	No	C. R. I. & P.	Bernice & Dubach	La. Junction Point	86,611			Yes
No	50%	No	K. C. S.	Myrtistown	La. Junction Point				
No		No	Frisco.	Burdette Jct.	Ark. 1½ Miles	14,944	6,267.12		Yes
No	96%	Yes	Miss. River Ldg.	Wolverton Ldg.	Ark. 5 Miles				
		No	Frisco.	Leachville	Mo.				
		No	Cotton Belt.	Arbyrd	Mo.	163,357			
		No	J. L. C. & E.	Littleton	Ark.				
	100%	No	Cotton Belt.	Alden Bridge	La. Junction Point	78,592	7,140.00		
\$1.50 per Car		Yes	St. L. I. M. & S.	Lowell Jct.	Mo. 3 Miles	8,000			Yes
No	95%	No	Frisco.	Poplar Bluff	Mo. Less than 1 Mile	184,688			Yes
2.00 per Car	65%	Yes	St. L. I. M. & S.	Rosboro	Ark. ¼ Mile	150,000	19,688.62		
1½c		Yes	Tex. & N. O.	Cairo	Tex. ½ Mile	1,348 Cars	25,062.71		Yes
2c R. I.	75%	Yes	C. R. I. & P.	Ola	Ark. 7 Miles	75,468			
3.00 I.M. & S.		Yes	C. R. I. & P.	Heth	Ark. 13 Miles	78,805			Yes
1½c	95%	Yes	St. L. I. M. & S.	Earle	Ark. 2½ Miles				
\$1.50 per Car		Yes	Frisco.	Blazer & Deering Jct.	Mo. 7 Miles				
2.50 per Car		Yes	Cotton Belt.	Hornersville	Mo. 14 Miles				
1½c			K. C. S.	De Queen	Ark. ½ Mile	49,217	46,603.76		Yes
No	80%	Yes	St. L. I. M. & S.	Kensett	Ark. 1½ Miles				Yes
2c	90%	No	C. R. I. & P.	Senrey	Ark. 6 Miles				
No		No	La. & Ark.	Cotton Valley	La. ¼ Mile	35,000	53,375.42		
2.50 per Car	63%	Yes	C. R. I. & P. and St. L. I. M. & S.	Eldorado	Ark. 10 Miles	40,487	37,608.28		Yes
2c		No	St. L. I. M. & S.	Alexander	La. Junction Point				No
No	85%	No	Ill. Cent.	Fernwood	La. ¼ Mile	79,011	66,000.00		Yes
			N. O. G. N.	Tylertown	La. 32 Miles				
			C. R. I. & P.	Fordyce	Ark. 1 Mile	29,000			
			Cotton Belt.	De Ridder	La. Minimum Haul	251,941	220,985.54		Yes
			G. C. & S. F. Ry.	De Ridder	La. ½ Mile				
			K. C. S. Ry.	Bon Ami	La. Maximum Haul				
			K. C. S. Ry.	Fulton	La. 41 Miles				
			N. O. T. & M. Ry. (Frisco Line)	Lake Charles	La.				
			Louisiana West. Ry. (So. Pac.)	Lake Charles	La.				
			K. C. S. Ry.	Lake Charles	La.				
			St. L. I. M. & S. Ry.	Lake Charles	La.				
			K. C. S. Ry.	Lake Charles	La.				
No	91.4%	Yes	Texas & Pacific Ry.	Mansfield Jct.	La. ¾ & 2½ Miles	45,135	26,826.95		Yes
1c	90%	Yes	L. C. & N. Ry.	Nitram	La. 6¼ Miles	380,164	116,359.74	40,292.31	Yes
2.00 Per Car		Yes	G. C. & S. F. Ry.	Nitram	La. 6¼ Miles				
2c per 100		Yes	St. L. I. M. & S. Ry.	Longleaf	La. ¼ Miles	39,183	30,789.96		Yes
			C. R. I. & P., So. Pac. and Tex. Pac.	Le Compte	La. 12 Miles				

Name	23 I C C Rep. Page	Status	When Incor- porated	Capital Stock	Bonded Indebtedness	Stock Ownership	Name Proprietary Mill	Mile- age	Equipm
Woodworth & La. Central Ry.....	327	Plant Facility	1900	\$ 25,000.00		Same as Prop. Co.	Rapides Lbr. Co.....	24	6 Loco., 2 Frt., 99 B
Salem, Winona & So. Ry.....	636	Common Carrier	1908	150,000.00	No	Same as Prop. Co.	Missouri Lbr. & Mining Co.....	19	2 Loco., 2 Coaches, 1
Victoria, Fisher & Western.....	602	Plant Facility	1902	300,000.00	No	Same as Prop. Co.	Louisiana Long Leaf Lbr. Co.....	31	5 Loco., 8 Frt., 103
Louisiana Central R. R.....	598	Plant Facility	1904	250,000.00	No	Same as Prop. Co.	Pickering Lbr. Co.....	42	10 Loco., 1 Pass., 4
North La. & Gulf R. R.....	599	Common Carrier	1906			Same as Prop. Co.	Huie-Hodge Lbr. Co.....	10	5 Loco., 1 Pass., 6 B
Mangham & North Eastern.....	331	Plant Facility	1905	50,000.00		Same as Prop. Co.	Stewart & Greer Lbr. Co.....	6	2 Loco., 1 Box, 23 L
New Orleans, N. & Natchez.....	642	Common Carrier	1902	155,000.00		Same as Prop. Co.	Natalbany Lbr. Co.....	25	10 Loco., 2 Pass., 1 C Flat, 2 Motor Cars
Ouachita & North Western R. R.....	603	Plant Facility	1905			Same as Prop. Co.	Louisiana Central Lbr. Co.....	35	7 Loco., 150 Cars.
Paragould & Memphis Ry.....	634	Common Carrier	1902	220,000.00		Same as Prop. Co.	Various 5 Mills.....	27	2 Loco., 1 Pass., 1 C
Peach River & Gulf Ry.....	332	Plant Facility	1904	100,000.00		Same as Prop. Co.	Miller-Vidor Lbr. Co.....	10	3 Loco., 1 Coach, 30
Prescott & North Western Ry.....	569	Common Carrier		30,000.00		Same as Prop. Co.	Ozan Lbr. Co.....	7	6 Loco., 101 Log., 1
Red River & Rocky Mountain.....	326	Plant Facility	1904	64,000.00		Same as Prop. Co.	Antrim Lbr. Co.....	12	3 Loco., 30 Log. Cse
Saline River Ry.....	553	Common Carrier	1897	125,000.00		Same as Prop. Co.	Saline River Lbr. Co.....	19	3 Loco., 1 Pass., 3 M
Saginaw & Ouachita River.....	552	Plant Facility	1905	25,000.00		Same as Prop. Co.	Saginaw Lbr. Co.....	52	1 Loco., 1 Cab. Car
Shreveport, H. & Gulf R. R.....	621	Common Carrier	1906	50,000.00		Same as Prop. Co.	Carter-Kelly Lbr. Co.....	9	4 Loco., 1 Pass., 1 Co
Tioga & South Eastern Ry.....	596	Plant Facility	1905	50,000.00		Same as Prop. Co.	Lee Lbr. Co.....	15	5 Loco., 52 Log. Car
Fourche River Valley & I. T. Ry.....	564	Common Carrier	1905	220,000.00	100,000.00	Same as Prop. Co.	Fourche River Lbr. Co.....	15	1 Loco., 1 Pass., 61 L
Groveton, L. & Northern Ry.....	622	Common Carrier	1908	50,000.00	437,000.00	Proprietary	Trinity County Lbr. Co.....	33	1 Loco., 2 Pass., 8 B
Memphis, D. & Gulf.....	573	Common Carrier	1906						
Miss. Valley Ry.....	633	Common Carrier	1904			Proprietary	Tyler Land & Timber Co.....	15	2 Loco., 1 Pass., 40
Moscow, Camden & S. A. Ry.....	623	Common Carrier	1898	50,000.00		Proprietary	W. T. Carter & Bros.....	7	1 Loco., 1 Pass., 14
Nacogdoches & South Eastern R. R.....	617	Common Carrier	1904	215,000.00		Same as Prop. Co.	Frost-Johnson Lbr. Co.....	17	2 Loco., 1 Pass., 8 B
Sibley Lake, B. & So. Ry.....	594	Common Carrier	1900	100,000.00	No	Same as Prop. Co.	Globe Lbr. Co.....	31	6 Loco., 2 Pass., 7 B
Texas South Eastern Ry.....	618	Common Carrier	1900	250,000.00		Same as Prop. Co.	Southern Pine Lbr. Co.....	28	4 Loco., 1 Cab., 1 P
Thorton & Alexandria Ry.....	561	Common Carrier	1904			Same as Prop. Co.	Stout Lbr. Co.....	18	4 Loco., 1 Pass., 10 P
Timpson & Henderson.....	620	Common Carrier	1900	250,000.00		Same as Prop. Co.	Ragley Lbr. Co.....	34	
Tremont & Gulf Ry.....	613	Common Carrier		2,000,000.00		Same as Prop. Co.	Tremont Lbr. Co.....	99	4 Loco., 3 Pass., 200

Equipment	Division Allowed	Proportion Proprietary Tonnage to Total	Passenger Service	Trunk Line Connections	Junction Points	Distance Proprietary Mill to Junction Point	Total Tonnage	Gross Revenue	Net Revenue	Files, Reports Tariffs
Loco., 2 Frt., 99 Log. Cars.....	No	95%	No	St. L. I. M. & S. Ry.....	Woodworth..... La.	25 Feet	42,807			Yes
				C. R. I. & P. Ry.....	Lamorie..... La.	6 Miles				
				Texas & Pacific.....	Lamorie..... La.	6 Miles				
				So. Pac. Ry.....	Lamorie..... La.	6 Miles				
Loco., 2 Coaches, 53 Frt. Cars.....	1½	90%	Yes	Frisco.....	Winona..... Mo.	16 Miles	64,562			Yes
Loco., 8 Frt., 105 Log. Cars.....		99%	Yes	K. C. S. Ry.....	Fisher..... La.	1 Mile	316,670			Yes
				Texas & Pac. Ry.....	Victoria..... La.	1/2 Mi. (25 Mile				
				G. C. & S. F. Ry.....	Cravens..... La.	1 1/4 miles				
				Kan. City So. Ry.....	Pickering..... La.	1/4 mile				
Loco., 1 Pass., 4 Frt., 1 Cab.....	1.50 Switch'g	99%	No	Lake Chas. & Northern.....	Barham..... La.	1/4 mile	216,364			Yes
					Cravens..... La.	1 1/4 miles				
Loco., 1 Pass., 6 Box, 7 Flat, 70 Log.	2c per 100	99%	Yes	C. R. I. & P. Ry.....	Hodge..... La.	Junction Point	40,228			Yes
	Hardwood			La. and North West.....	Bienville..... La.					
Loco., 1 Box, 23 Log. Cars.....	No			Iron Mountain.....	Mangham..... La.					
Loco., 2 Pass., 1 Cab., 6 Box, 130	1.50 Per Car									
Flat, 2 Motor Cars.....	Switching	80%	Yes	Ill. Central Ry.....	Natalbany..... La.	1500 feet	236,657	163,297.93		Yes
Loco., 150 Cars.....	Switching	99%	No	Iron Mountain Ry.....	Standard..... La.	1/2 mile	412,205			Yes
				Iron Mountain Ry.....	Clarks..... La.	Junction Point				
				Cotton Belt Route.....	Cardwell..... Mo.	1 mile				
				Frisco Route.....	Manilla..... Ark.	4 miles				
Loco., 1 Pass., 1 Cab., 53 Frt. Cars	3.00 & 2.00	25%		Jonesboro City & Eastern.....	Manilla..... Ark.	4 miles	80,000		19,727.94	
Loco., 1 Coach, 30 Frt. Cars.....	No	100%	No	G. C. & S. F. Ry.....	Timber..... Texas	Junction Point				Yes
				H. E. & W. T. Ry.....	Midline..... Texas	10 miles				
Loco., 101 Log., 1 Pass. Cars.....	1.50 Switch'g		Yes	Iron Mountain Ry.....	Prescott..... Ark.	1200 feet				
Loco., 30 Log. Cars.....	No	100%	No	Cotton Belt Route.....	Antrim..... La.	3/4 miles				
Loco., 1 Pass., 3 Misc., 35 Log. Cars	2c per 100	98%	Yes	Cotton Belt Route.....	Draughton..... Ark.	Junction Point	21,060.19			
				Warren & O. V. Ry.....	Glynn..... Ark.	19 miles				
Loco., 1 Cab. Cars.....	Switching	99%	Yes	Iron Mountain Ry.....	Saginaw..... Ark.	2 1/2 miles				
Loco., 1 Pass., 1 Comb., 32 Frt. Cars	1 1/2c per 100		Yes	Texas and New Orleans.....	Manning..... Texas	9 miles	21,955.02			Yes
				Cotton Belt Route.....	Prestridge..... Texas					
Loco., 52 Log. Cars.....	No	99%		Iron Mountain Ry.....	Tioga..... La.	Junction Point	44,782			
				L. R. & N. Ry.....	Enis..... La.	9 miles				
Loco., 1 Pass., 61 Log., 1 Tank Cars	1.50 per Car	95%	Yes	Rock Island.....	Biglow..... Ark.	1 mile				
Loco., 2 Pass., 8 Box, 21 Flat Cars	2.00 per Car	75%	Yes	Mo. Kat. & Texas.....	Groveton..... Texas	1 mile				
	2c per 100			Various Lines.....	Lufkin..... Texas	33 miles	60,175	43,075.00		
Loco., 1 Pass., 40 Log. Cars.....	1 1/2c per 100	77%	Yes	St. Louis & San Fran. R. R.....	Steele.....	9 miles	57,245			No
Loco., 1 Pass., 16 Frt. Cars.....	1 1/2c per 100	95%	Yes	H. E. & W. T. Ry.....	Moscow..... Texas	7 miles				
				Texas & New Orleans.....	Hayward..... Texas	1/4 miles				
Loco., 1 Pass., 8 Frt., 54 Log. Cars	1.50 per Car	88%	Yes	H. E. & W. T. Ry.....	Nacogdoches..... Texas	1 1/4 miles				
				V. S. & P. Ry.....	Sibley..... La.	5 miles				
Loco., 2 Pass., 7 Frt., 106 Log. Cars	1c per 100	70%	Yes	L. & A. Ry.....	Sibley..... La.		53,661	49,758.24		Yes
Loco., 1 Cab., 1 Pass., 94 Frt. Cars	2.00 per Car		Yes	H. E. & W. T. Ry.....	Lufkin..... Texas	3000 feet	60,658	98,543.91		Yes
	2c per 100			Eastern Texas R. R.....	Neff..... Texas	18 miles				
Loco., 1 Pass., 10 Frt., 50 Log. Cars	1c per 100	95%	Yes	C. R. I. & P. Ry.....	Tinsman..... Ark.	Junction Point				
				Cotton Belt Route.....	Thornton..... Ark.					
	2c per 100	60%	Yes	I. & G. N. Ry.....	Henderson..... Texas	12 miles				Yes
				H. E. & W. T. Ry.....	Timpson..... Texas	10 miles				
	1.50 per Car			Iron Mountain.....						
	1 1/2c per 100			C. R. I. & P. Ry.....						
Loco., 3 Pass., 200 Frt. Cars.....	2c per 100	83%			Rochelle..... La.		191,374			Yes
					Jonesboro..... La.					
				V. S. & P.....	Tremont..... La.					

TAP-LINE CASES,

IN THE / b

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

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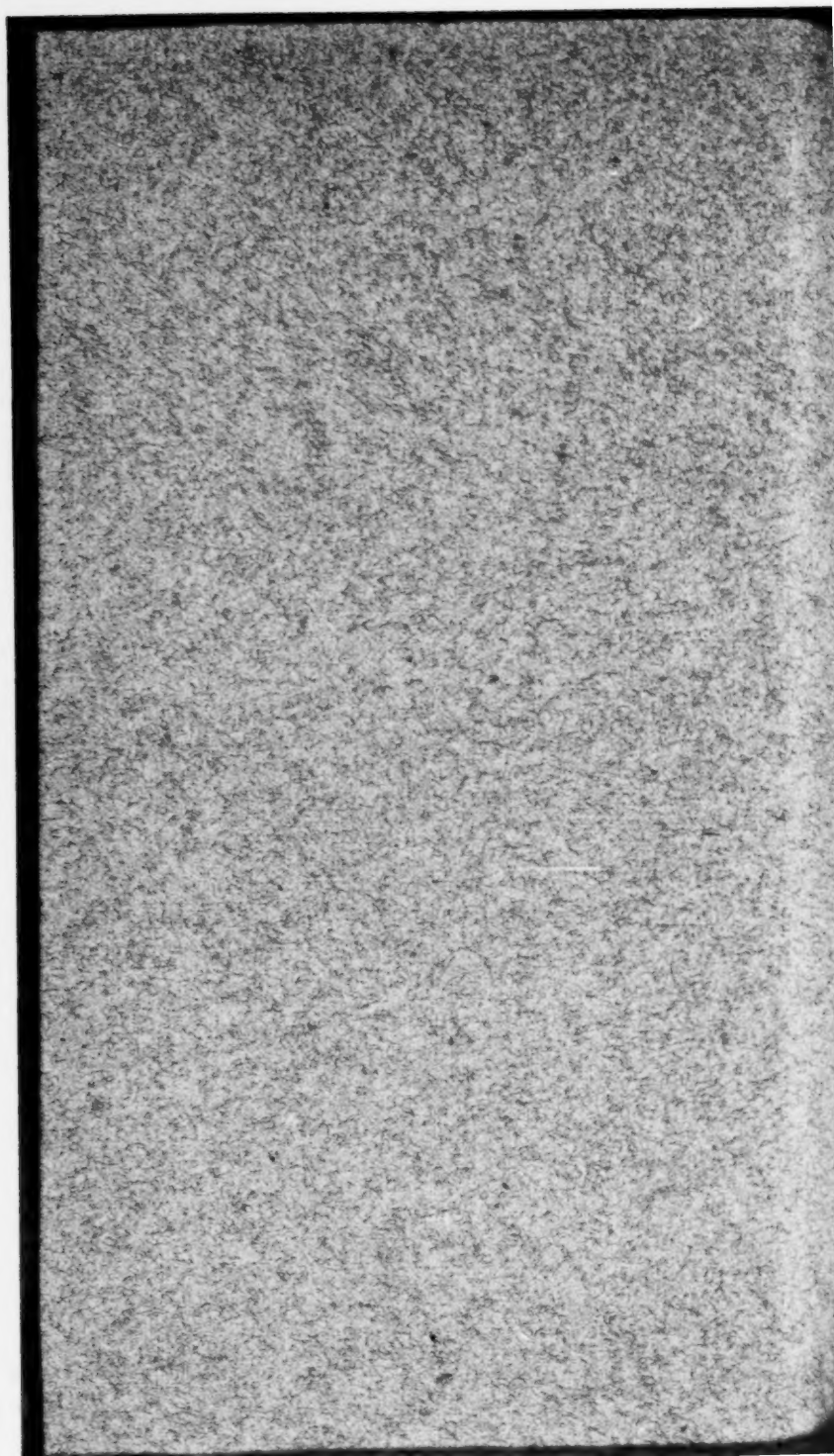
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UNITED STATES,	Appellant,	No. 828.
vs.		
LOUISIANA & PACIFIC RAILWAY COMPANY et al.,	Appellees.	
UNITED STATES,	Appellant,	No. 831.
vs.		
WOODWORTH & LOUISIANA CENTRAL RAILWAY COMPANY, et al.,	Appellees.	
UNITED STATES,	Appellant,	No. 833.
vs.		
MANFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,	Appellees.	
UNITED STATES,	Appellant,	No. 835.
vs.		
VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 839.
vs.		
LOUISIANA & PACIFIC RAILWAY COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 832.
vs.		
WOODWORTH & LOUISIANA CENTRAL RAILWAY CO., et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 834.
vs.		
MANFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 836.
vs.		
VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,	Appellees.	

ON APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF OF FACTS FOR APPELLEES.

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
FOR APPELLEES.



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IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

UNITED STATES,	vs.	Appellant,	}	No. 829.
		Appellees.		
LOUISIANA & PACIFIC RAILWAY COMPANY et al.,				

UNITED STATES,	vs.	Appellant,	}	No. 831.
		Appellees.		
WOODWORTH & LOUISIANA CENTRAL RAILWAY COMPANY, et al.,				

UNITED STATES,	vs.	Appellant,	}	No. 833.
		Appellees.		
MANSFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,				

UNITED STATES,	vs.	Appellant,	}	No. 835.
		Appellees.		
VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,				

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	vs.	Appellant,	}	No. 830.
		Appellees.		
LOUISIANA & PACIFIC RAILWAY COMPANY, et al.,				

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	vs.	Appellant,	}	No. 832.
		Appellees.		
WOODWORTH & LOUISIANA CENTRAL RAILWAY CO., et al.,				

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	vs.	Appellant,	}	No. 834.
		Appellees.		
MANSFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,				

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	vs.	Appellant,	}	No. 836.
		Appellees.		
VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,				

ON APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF OF FACTS FOR APPELLEES.

FACTS AS TO LOUISIANA & PACIFIC RAILWAY COMPANY.

The conclusions and findings of the Commission with reference to the Louisiana & Pacific Railway will be found on pages 391-394 of the opinion of the Interstate Commerce Commission of date April 23, 1912.

The testimony applicable to the Louisiana & Pacific Railway in the original hearing herein had at New Orleans December 8, 1909, and following, will be found in the testimony of David McLean, Vol. I, printed record, page 626, R. S. Davis, Vol. I, page 650, and page 685, David McLean, Vol. I, page 736, P. C. Rickey, Vol. I, page 725, and C. B. Stuart, Vol. I, page 748.

The Interstate Commerce Commission found that the Louisiana & Pacific Railway Company was not entitled to any compensation whatsoever for any service performed by it. It was not only forbidden to receive any portion of the through rate by way of division but was allowed no compensation for switching or other service. The conclusion of the Commission is expressed on page 394 of the opinion where it is said "We regard the whole arrangement as indefensible and unlawful and see no grounds upon which any allowance may lawfully be made." The formal order following the opinion forbids the allowance of any compensation whatsoever to the Louisiana & Pacific for any service by it performed on the lumber, logs or other forest products of either of the lumber companies parties complainant herein.

We desire to refer to some of the conclusions drawn by the Interstate Commerce Commission in

the "tap-line" case in order to make a comparison of the findings as made by the Commission with the actual facts in reference to the railroad in question.

The Interstate Commerce Commission in its report in the so-called "tap-line case" describes what it conceives to be an industrial railroad (23 I. C. C. Rep. 277).

It gives an estimate of the money which has been paid in divisions to "tap-line" roads (278). It recites that the Commission has investigated a large number of tap-lines, and makes a certain sort of classification of these lines. Goes into the history and growth and development of the lumber manufacturing business and of the transportation facilities used thereon (279).

It draws the conclusion that the larger lumber companies through their tap-line railroads receive an allowance while the smaller concerns do not. It points out that some of what it calls "tap-lines" do not receive an allowance because they are not incorporated, although they do as much business as others which are incorporated. This refers, doubtless, to the Kirby concerns (280).

Under the heading of "Discriminations resulting from allowances" it picks out isolated cases of very high allowances for very small services. It does not give the facts nor even refer to the record showing upon what evidence it bases these statements. It points out some abuses in the matter of allowances from the trunk lines to tap-lines. It cites another proceeding pending before it (281), not a part of the investigation and Suspension Docket No. 11, and draws conclusions from this other case.

It devotes 7 page or two under the heading "Tap-lines generally described," and instead of generally describing tap-lines, it picks out tap lines which are mere logging railroads and uses these as illustrations of tap lines generally.

It recites numerous instances of abuse of the incorporation of a railroad and numerous facts relating to certain tap lines, but when it comes to state the facts in reference to the Louisiana & Pacific Railway, it does not make any distinction between that railroad and the class of tap lines which are so severely criticised, when the truth is that the very converse of the facts which the Commission cites in condemnation of tap lines is true in almost every detail as applied to the Louisiana & Pacific. For instance, the report indicates (291) that by reason of the "tap line" the owners of the "tap line" can have a monopoly of the timber, and can keep other timber owners from reaching their mills and markets with the timber. The record before the Commission (L. C. C. Rec. Vol. I, page 646) in the case of the Louisiana & Pacific, shows that outside interests did have the benefit of the Louisiana & Pacific Railroad until that opinion was rendered and that by reason of the rendition of that opinion millions of feet of timber are unable to have the transportation facilities which they formerly had.

The Commission says:

"If there is a holding out as a common carrier for hire and if there is an ostensible and actual movement of traffic for the public for hire, generally speaking, the status of a common carrier may be said to exist."

And (receding from the former doctrine laid down):

"The common ownership of an industry and of a railroad that is held out as a common carrier and has some actual traffic for the public for hire is not in itself sufficient to divest the railroad of its status as a common carrier."

And then the Commission lay down the doctrine that if a railroad is a mere plant facility the fact that some outside traffic is carried over the same rails does not change the character of the railroad.

After making these general observations, the Commission says that the question is not susceptible of solution on general grounds and that each case must stand on its own facts. The Commission (294) proceeds to fix arbitrary distances between a thousand feet and three miles within which limits they say allowances may or may not be had. And then, when they come to decide the individual cases they absolutely ignore even this arbitrary distinction they have made, and we can take railroads side by side on the map, in which the Commission permits an allowance to one railroad and deny it to another, without any logical or apparent reason for the distinction they so make.

In its specific finding of facts in reference to the Louisiana & Pacific Railway the Commission makes many mis-statements—statements which are not borne out by the evidence before the Commission, and statements which are directly refuted by the evidence before this court.

The Commission says that:

The road is controlled by what is referred to

on the records as the R. A. Long interests; 70 per cent. of its capital stock being held by R. A. Long, and the rest, apparently, by his agents and associates.

This statement as to R. A. Long owning 70 per cent. or more of the capital stock, is substantially correct, but the statement that the rest is apparently held by his agents or associates is incorrect and misleading.

The record shows (Vol. V, p. 102) just how the stock is owned and held. The other stockholders are not agents for Mr. Long, although they are his associates in business. They own the stock absolutely in their own right (I. C. C. Rec., Vol. 1, page 749).

The Commission further states:

The record indicates that Long owns the same proportion of the capital stock of the Hudson River Lumber Company, King-Ryder Lumber Company, Longville Lumber Company, and the Calcasieu Long Leaf Lumber Company, all of which have mills on the Louisiana & Pacific.

A list of the stockholders of these lumber companies is given on pages 102-105, Vol. V of Record, and shows a large number of stockholders and a large amount of stock held by parties having no interest in the Louisiana & Pacific Railway. It shows that there is \$1,619,300 of stock held by stockholders in the lumber companies who have absolutely no interest in the railway company. Attention is directed to the statement of M. B. Nelson (Vol. 4, p. 2872 Printed Record) that he owns stock in Long Bell Company of book value of \$270,000, and owns no interest in the Louisiana & Pacific or any other railway.

The Commission says:

All of the tracks of the Louisiana & Pacific, as hereinafter described, were originally constructed as private logging roads by the individual lumber companies.

This statement, while substantially correct as to the branch lines, is not correct as to the line between De Ridder and Lake Charles, known as the joint track. This track was originally constructed by the Louisiana & Pacific Railway Company as any other railroad is constructed (I. C. C. Rec., Vol. 1, pages 654-5-6). To make the statement quoted with the implication therein contained that the Louisiana & Pacific railroad was originally constructed as a mere logging road, is exceedingly unfair in the light of the history of this road, as set out on pages 68 to 82 inclusive of the petition of the Louisiana & Pacific Railway Company herein, and the facts disclosed by the record before the Commission and the record before this court.

The Commission says (592):

The Louisiana & Pacific pays the Lake Charles Northern 25 cents per train-mile for trains that it operates over their tracks and also bears a *certain portion* of the station expenses.

This "certain portion" is 60 per cent. plus the entire station expenses of the Louisiana & Pacific separate station at Lake Charles.

In view of the next statement that:

In view of the price received by the R. A. Long interests from the Southern Pacific, the trackage arrangement is obviously a most advantageous one.

It would seem that the Commission might have

given the exact figures to support or refute its conclusion that the trackage arrangement is obviously a most advantageous one; and to have further stated whether it was advantageous to the Louisiana & Pacific or to the Lake Charles & Northern Railroad Company.

The Interstate Commerce Commission has evidently wholly misunderstood the nature of the so-called trackage arrangement between the Louisiana & Pacific Railway Company and the Lake Charles & Northern Railroad Company. The so-called trackage right which is evidently the basis of the treatment of the Louisiana & Pacific by the Commission, does not stand upon the same plane as an independent trackage right made by an old company with one seeking to enter upon its rails. The difference is this: The Louisiana & Pacific had practically constructed a railroad. It owned a railway from De Ridder to Lake Charles, a distance of 43 miles. A considerable portion of this had already been constructed and laid with steel. The right of way for the entire distance had been procured. The roadbed for the larger portion of the way had already been constructed and steel purchased therefor. The Southern Pacific interests, desiring to build northward into practically the same territory, find this railway already upon the ground, and not wishing to expend money in the construction of an additional railway begin negotiations for the purchase of the properties of the Louisiana & Pacific. The latter road sells that portion of its line referred to, that is to say, from De Ridder to Lake Charles, but reserves title to the right of trackage and operation

over it from De Ridder to Lake Charles. The documents introduced in evidence conclusively show that the reservation of the trackage right was contemporaneous with all of the other documents and consisted of one single indivisible transaction.

The purpose of the construction of the Louisiana & Pacific was to secure the facilities of several different trunk line connections through which the varied lumber interests on its line could secure sufficient car service and obtain entrance to varied traffic territories. The testimony indisputably shows that no one or two lines could furnish a sufficient number of cars nor reach sufficient trade territory to permit profitable operation of the lumber industries. By reserving from the properties conveyed to the Lake Charles & Northern Railway the right to operate over its tracks, the Louisiana & Pacific was relieved of a large capital investment and reserved the advantages proposed in its original construction. The agreement of October 31, 1906 (see page 198, transcript of record in No. 829), clearly discloses the nature of this contract. The sale by the Louisiana & Pacific to the Lake Charles & Northern was clearly made upon condition that the former should have the joint use of the tracks conveyed to the latter. This is indicated by the following clause of the contract:

The said second party desires to purchase said first party's said line of road from De Ridder to said point on the Calcasieu River and said right of way from Lake Charles to the junction of said narrow gauge road in said Section 32; and said first party is willing to sell its said line and said right of way on condition that it can have the joint use of said line of road from

De Ridder to Lake Charles, which condition is not objectionable to said second party.

Again, clause 6 of the agreement of sale is as follows:

Immediately upon the conveyance by said first party to said second party of the property herein contracted to be sold, said second party shall execute and deliver to said first party a contract giving said first party joint trackage rights over the entire line of railroad above mentioned except that part thereof lying between said point on the Calcasieu River in Section 10 and said junction point in said Section 32; said trackage agreement shall vest in said first party trackage rights over the said line of railroad from De Ridder to Lake Charles with all the appurtenances thereto, for a period of 20 years from date of this contract for such trains as said first party may desire to operate over said road, provided that the number of trains operated by said first party over said line of railroad shall not materially interfere with the operations of trains by said second party.

This contract was followed by conveyance of the title to that portion of the Louisiana & Pacific Railroad mentioned in the agreement with the reservation of the trackage right, and due execution of the trackage agreement stating the compensation and method of operation, etc. So that it is shown indisputably upon the record that while the Louisiana & Pacific Company sold that portion of its physical properties lying between De Ridder and Lake Charles, it reserved to itself an estate therein, to wit, the right to operate its trains thereover for the full period of 20 years from the date of the agreement. That there is nothing "indefensible" or "illegal" in

this arrangement is evident from the fact that the Lake Charles & Northern, wishing to enter the territory beyond De Ridder and finding the Jasper & Eastern, a Santa Fe property, already on the ground, obtained trackage rights over that line from De Ridder to Nitram. Such trackage agreements, as shown by the record herein, are common. The present agreement, however, stands on a different basis, because the Louisiana & Pacific owning originally the entire title, conveys it to the Lake Charles & Northern, reserving an estate to itself, that is, the easement of operation thereover for a period of 20 years.

The Commission says (23 Rep. 592):

The Louisiana & Pacific is a peculiar property. There are five separate branches or tracks not directly connected with each other, but all joining at different points, the track conveyed to the Lake Charles & Northern.

These tracks are connected just the same as any branch lines of any railroad are connected with the main line. It is true that the main line between De Ridder and Lake Charles is a joint track; that is, both the Lake Charles & Northern and the Louisiana & Pacific operate over it just as the Lake Charles & Northern operates over the Santa Fe track immediately north and as hundreds of railroads operate and have trackage rights over other railroads. But the five branch lines mentioned by the Commission are physically connected; through trains run directly from the various termini of the branch lines to Lake Charles. They run in the opposite direction from Lake Charles and out over the various branch lines and logs are hauled, by companies in no way con-

needed with this suit, from Camp Curtis over the Camp Curtis branch line, and then on the main line up to the mill at Bannister, where they are manufactured into lumber, and the lumber goes out over the line between De Ridder and Lake Charles over five transcontinental trunk lines connecting with the Louisiana & Pacific at Lake Charles, Fulton and De Ridder.

The same thing is true in reference to the other branch lines. That is to say, in the transportation both of logs and lumber, there is no distinction between the branch lines and the main line between De Ridder and Lake Charles. The whole thing is operated as one system and freight is carried from the terminus of a branch line, then over the main line or joint track and out on to another branch line.

The Commission says (592) :

The five tracks may be described as follows: (1) A track connecting with the Lake Charles & Northern at De Ridder Junction, and extending eight miles to Bundicks, which is apparently a logging camp with a company store. The mill of the Hudson River Lumber Company, *in whose interest* this track is operated, is at De Ridder, being within a few hundred feet of the rails of the trunk lines.

This statement is absolutely misleading. It gives the impression that the De Ridder-Bundick branch is nothing but a logging road serving only the Hudson River Lumber Company, and that company, because "within a few hundred feet of the rails of the trunk lines," does not need the Louisiana & Pacific Railway for transportation services.

The record shows a large quantity of general

merchandise, such as flour, mill products, fruit and vegetables, packing house products, stone and sand, petroleum, sugar, naval stores, iron and steel rails, castings and machinery, brick and lime, household goods, other manufactures and miscellaneous commodities handled for independent shippers in no wise connected with either of the lumber companies referred to as proprietary interests. See Vol. V, pages 2-4.

The statement of merchandise received from various connections shown on pages 11 and 12 of the petition in this case shows that from July 1, 1911, to April 30, 1912, there was shipped to Bundick coming from:

Kansas City Southern Railway.....	140 tons
From the Frisco	38 tons
From the Iron Mountain	18 tons
From the Southern Pacific.....	34 tons

The statement that the mill of the Hudson River Lumber Company is within a few hundred feet of the rails of the trunk lines and the inference drawn from this statement and other statements of the Commission that the Louisiana & Pacific is for that reason a plant facility, will be considered later.

The Commission says (page 592):

(2) At Lilly Junction, a second section of the track of the tap-line connects with the Lake Charles & Northern, extending therefrom about $7\frac{1}{2}$ miles to a point in the woods known as Walla, where the King-Ryder Lumber Company has a commissary, and there is a small independent yellow pine mill, owned by the Bundick Creek Lumber Company. The mill of the King-Ryder Company is at Bonami, on the track jointly operated by the tap-line and the Lake

Charles & Northern. This is a town of 2,000 people, but apparently has no other industries.

A comparison of the statement just above referred to of merchandise going to Walla shows:

From the Kansas City Southern 672 tons (quite a little merchandise which the "trunk line" could not deliver to Walla, except for the Walla branch of the Louisiana & Pacific).

From the Santa Fe	1 ton
From the Frisco	38 tons
From the Iron Mountain	70 tons
From the Southern Pacific	41 tons

Not a ton of this merchandise could be delivered by rail to Walla except for the branch line alleged by the Commission to serve only the King Ryder Lumber Company.

The Commission says (page 592):

Two miles of incorporated track of the Louisiana & Pacific connect with the Lake Charles & Northern track at Longville, a town of 2,000 population, where the Longville Lumber Company has its mill, and a store. There are also several independent stores.

The record before this court shows that the Longville branch is now 5½ miles long. And the Brown Lumber Company shipped over it, and the "independent stores" have absolutely no other railroad facilities (see map).

The Commission says (page 592):

(4) There are nine miles of track connecting with the Lake Charles & Northern at Fayette, and extending to Camp Curtis, a settlement of 200 people, where the Calcasieu Long Leaf Lumber Company has a company store, its mill being at Lake Charles.

This nine miles of track connects directly with the main line or "joint track" and affords a through haul from Camp Curtis to Lake Charles, a distance of 30.3 miles. So that instead of being an isolated logging road of nine miles, as the Commission's report would make it appear, it has 30 miles of road direct from Camp Curtis to Lake Charles, and, as heretofore pointed out, independent lumber companies did, up to the time of the Commission's report, ship logs over this Camp Curtis branch into Bannister, a point at which there are no "Long" interests.

The Commission says (Rec., 593) :

(5) A track one mile in length described on the record as connecting with the Lake Charles & Northern at Bridge Junction and running to Lake Charles station.

Why cut a railroad system up into fractional parts, some as small as one mile, and then treat the several parts as if they had no connection with one another?

The one mile in question is that fork of the railroad which is owned and used exclusively by the Louisiana & Pacific, and which runs into its station, as distinguished from that part of the road South of the Calcasieu River, which runs to the station of the Lake Charles & Northern.

The Commission says (Rec., 593) :

There are a number of other towns or settlements named on the record, which it is unnecessary to mention; and there is a second *small* independent mill, owned by the Brown Lumber Company, and located at Bannister, on the Lake Charles & Northern.

These other towns and settlements are those in which the "Long" companies have no mills, and together with mill ponds connected to the Company from these other towns and settlements make an aggregate of 20 or more.

The small independent mill of the Western Lumber Company located at Hamilton, on the "Long" route of Northern Idaho Lake & Shoshone was more than the Lumber Co. Pacific, but a quantity of 15,000 feet per day. They are connected with a lumber. They handle logs and hold the Lake & Shoshone (Camp Pacific) branch and the Hamilton branch.

This Western Lumber Company will other lumber companies out of the "Long" route. Lumber has been used since 1910 through 1914 from 20 miles that is manufactured product along the Lumber Co. Pacific road, 25 per cent of the lumber company of that road. (See page 101.)

The Commission were (1914)

The route was located by the topography to the mill in distance of about 10 miles. The survey is made by the topography around the Pacific route for the log settlement.

Tariffs are the with the Commission that the logs are located into the mill and the product of these logs taken on to the product value for the log. The charge of 1 cent per thousand pounds. In other words, the logs are treated with the tollage making a fixed amount. (See page 102, 103, 104.)

The Commission were (1914)

The topography reflects the cost of lumber a distance of three-quarters of a mile from the

connections of the Louisiana & Pacific. It does not, and in the nature of things could not, all go out over the nearest trunk line to the mill. This is explained very clearly by witnesses, R. S. Davis and David McLean, Vol. I, p. 636, *et seq.*, Vol. V, p. 9. The tonnage during the latter half of 1912 was divided; 21.7% to Kansas City Southern, 32.7% to the Frisco, 37% to Southern Pacific and 8.6% to Iron Mountain.

The Commission says (Rec., 594):

The annual report to the Commission for the year ending June 30, 1910, shows an operating revenue of \$220,985.94, with operating expenses amounting to \$145,433.69. There was an accumulated surplus on that date of \$73,581.07.

This is erroneous in that from that sum should be taken interest, taxes, per diem charges, trackage rights, showing a surplus for the fiscal year ending June 30, 1910, of \$16,000. Vol. I, p. 643.

The Commission says (Rec., 92):

A logging train runs daily on each of the branches, and there is one mixed train, loaded chiefly with logs and lumber moving over the track between Lake Charles and De Ridder.

The fact is, as shown by the testimony taken before the Commission, volume 1, page 643, that there were two regular scheduled mixed trains per day and these trains were *not* loaded with logs, which would be a violation of the law to run logging cars in other trains. Why that charge should have been insinuated in the Commission's report is more inexplicable than all of the others because we have been unable to find a word in the record that could be distorted to indicate that these mixed passenger and freight trains were loaded with logs.

The especial attention of the Court is directed to the movement of the manufactured lumber over the Louisiana & Pacific. See Vol. V, p. 9, exhibit showing movement of cars loaded with lumber from various mills to several railway connections for years 1908-1909 and 1910. The testimony of the witnesses, Davis and Sweet, shows that no single line of railway could either furnish a sufficient number of cars to enable the lumber companies complainant herein to operate their mills, nor could any single line of railway afford them entrance to the different trade territories, and it was to obtain connection with a number of railways that the line of the Louisiana & Pacific was originally constructed and the reservation of the easement made.

Davis' testimony in this case shows that the Hudson River Lumber Company, the mill of which is at De Ridder, for the period from July 1st to December 31, 1912, produced 1,018 cars. Of this total product 378 cars were delivered to the Kansas City Southern at De Ridder, 284 were transported 25.6 miles to Fullerton, where they were delivered to the Frisco, 259 a distance of 43.3 miles to Lake Charles, where they were delivered to the Southern Pacific line, and 97 were there delivered to the Iron Mountain & Southern. For the same period the King-Ryder Company at Bonami produced 1,657 cars, of which 460 were delivered to the Kansas City Southern, 526 were transported a distance of 21.8 miles to Fullerton, where delivery was made to the Frisco, 579 were hauled 39.5 miles to Lake Charles and delivered to the Southern Pacific, while 92 were delivered at Lake Charles to the Iron Mountain &

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Southern. The Longville Lumber Company at Longville produced 1,655 cars during this period, of which 211 were hauled 18.4 miles to De Ridder where they were delivered to the Kansas City Southern, 690 were hauled 7.2 miles to Fullerton, where they were delivered to the Frisco, 618 were hauled 24.9 miles to Lake Charles, where they were delivered to the Southern Pacific, and 136 were delivered at Lake Charles to the Iron Mountain & Southern.

The Calcasieu Long Leaf Lumber Company, located at Lake Charles, produced during that time 1,353 cars, of which 183 were delivered to the Kansas City Southern at Lake Charles, the haul being three-fourths of a mile. Three hundred and fifty-seven were delivered to the Frisco and hauled 17.7 miles to Fullerton, 649 were delivered to the Southern Pacific at Lake Charles, with a haul of three-fourths of a mile; and 164 to the Iron Mountain at Lake Charles, a haul of three-fourths of a mile. Davis' Exhibits, page 394, show figures of the same character for each mill during the period from July 1, 1909, to June 30, 1910, giving the movement of the product of each mill, there being a total production of the four mills of 9,678 cars, with an average haul of 18.82 miles per car. The exhibit, page 396, covering the period from January 1st to December 31, 1910, shows a production of the four mills of 11,254 cars, and as in each of the other two exhibits, shows the movement from each mill to each railway, with the average haul of 19.08 miles per car. These exhibits, in connection with the testimony of Mr. Davis and Mr. Sweet, show that there is often a movement from Lake Charles to De Ridder, a dis-

tance of 43.3 miles, and from De Ridder to Lake Charles, and from each mill to each railway, in accordance with the exigency of the need for cars and of the market to be reached.

It is also apparent from the undisputed testimony of the witnesses, Davis and Sweet, that no one connecting railway can or will furnish the cars and by reason of the fact that through routes and rates are not available, access to the various markets could not be obtained where the service of a single railroad only is available. For example, there are no through rates in between the Lake Charles & Northern and the Frisco. If it was desired to ship lumber from DeRidder, Bonami, Longville or Calcasieu via the Frisco and Fullerton, if the limits there located were tied down to the Lake Charles & Northern they would be compelled to pay the Lake Charles & Northern local rate to Fullerton plus the blanket rate via the Frisco to point of ultimate destination, and again, the Lake Charles & Northern would not furnish cars for transportation of lumber in times of shortage to points on the Frisco, it being the universal practice for every line so far as possible to conserve its car supply for its own points rather than those of rival companies.

These exhibits and this testimony show not only that the service rendered by the Louisiana & Pacific is a strictly transportation service, but demonstrate the business necessity for the construction of the Louisiana & Pacific and the reservation of the estate described in the trackage agreement above referred to.

The Louisiana & Pacific Railway Company is duly chartered and incorporated and existing as a railway

company under the laws of the State of Louisiana, with all the powers of a railway company, including the right to operate as a common carrier of freight and passengers. Constitution of the State of Louisiana, Articles 271, 272 and 273, Revised Statutes of Louisiana, 1479 (quoted in petition, page 2). It operates a main line of railway from DeRidder to Lake Charles, a distance of about 44 miles (Rec., 12), with four branch lines, all of which fully appear by reference to map of the Louisiana & Pacific Railroad attached to petition in this case. Its total miles of main and branch lines is 75 miles. It has nine miles of yards and side tracks (see map). It is engaged in state and interstate commerce. It connects with the Louisiana & Pacific Railway (Southern system) at Lake Charles. With the New Orleans and Texas (Frisco system) at Fulton. With the Kansas City Southern at Bonami, DeRidder and Lake Charles. With the Gulf, Colorado & Santa Fe at DeRidder, and with the St. Louis, Iron Mountain & Southern at Lake Charles. It complies with the rules and regulations of the State Railroad Commission and of the Interstate Commerce Commission and with the laws of the state and United States relating to common carriers.

It carries a full line of class and commodity rates between points on its own line in Louisiana and concurs in joint tariffs applying between points on its own road and points on connecting lines in Louisiana, and carries a full line of class and commodity rates from and to all interstate territory via all connecting lines, except the Gulf, Colorado & Santa Fe Railway Company.

It maintains an operating force consisting of a general superintendent, local auditor, car accountant, chief dispatcher, two telegraph operators, five agents who also are telegraph operators, fifteen clerks, five stenographers, eight train crews, and the necessary section gangs and track men, varying from time to time; none of which operating force is in any way connected with any of the lumber companies, petitioners herein, or of any other lumber company located on its line of road. (Rec., 98.)

In addition to the lumber traffic handled, it receives from and delivers to various connections merchandise in carload and less than carload quantities, and handles passengers on mixed trains between DeRidder and Lake Charles under tariffs filed with and approved by the Louisiana Railroad Commission and filed with the Interstate Commerce Commission.

There are on the lines of this road 20 cities, towns, villages or stations, from and to which it receives and delivers all kinds of freight. Two of these towns, Bonami and Longville, have a population of about 2,000 each; DeRidder has a population of 4,000; Lake Charles has a population of over 12,000. (Rec., Vol. 1, pp. 646-647.)

There are various corporations, individuals and industries located on its line of road and which it serves as a common carrier, none of which, nor the stockholders in which, have any interest in the Louisiana & Pacific Railway Company, or in any of the petitioners herein. Among other such industries the W. A. Brown Lumber Company have a saw mill located at Bannister, Louisiana, to which saw mill, prior to the 1st of May, 1912, they shipped logs over

both the branch and main line of the Louisiana & Pacific Railway." (Vol. 1, 646-647.)

It has invested in property over \$623,000. At the time of the hearing before the Commission, \$607,000. (I. C. C. Rec. Vol. 1, page 638.)

It has an equipment consisting of: 22 locomotives, 14 box cars, 15 flat cars, 6 cabooses, 1 work car, 1 derrick car, 1 office car, 270 logging cars, 1 tank car, 1 refrigerator, 10 outfit cars, 8 gondolas, 3 stock cars. (Vol. 1, p. 644.)

The country through which the railroad runs, after the timber is cut off, is an agricultural and stock raising country. The land is worth from \$10 to \$30 per acre. (Rec., 101-102.)

A larger portion of the tonnage of the Louisiana & Pacific Railway consists of logs and lumber, and the larger portion of this log and lumber tonnage comes from the lumber companies in which the majority are stockholders in the railroad and own a majority of the stock; but the railroad carries a diversified tonnage. Tonnage statements for the years 1908, 1909, 1910 and 1911 are shown on page 10 of the petition herein. These same tonnage statements, up to the time of the hearing before the Commission, were offered in evidence before the Commission.

A significant fact is, that while the Commission find (Rec., 593) that 98 per cent. of the entire tonnage at the time of the hearing before the Commission was supplied by the so-called "Long interests," yet from the period from July 1, 1911, to April 13, 1912, which was prior to the date of the handling down of the Commission's report, this per cent.

changed so that only 68 per cent. came from the so-called Long interests and 32 per cent. from parties having no interest in the Louisiana & Pacific Railway Company, or any of the lumber companies, petitioners herein. Tonnage statements set out on pages 11, 12, 13 and 14 of the petition show that this railroad received from connecting carriers a larger amount of merchandise destined to other than the petitioner lumber companies than it did of merchandise destined to the petitioner lumber companies, and that this merchandise came in considerable quantities and was consigned to every station on the line of the road; the total exact figures being 3,200 tons of merchandise to the lumber companies known as the "Long interests," and 3,208 tons to others.

A recapitulation of the freight handled during the year ending June 30, 1912, shows 258,635 tons of lumber handled for the so-called Long interests; 17,731 tons handled for others; 7,972 tons of miscellaneous freight was handled for the Long interests; 6,752 tons miscellaneous freight for others.

The road has a bonded indebtedness of \$442,300, secured by deeds of trust and bonds held by various individuals, banks and trust companies, none of whom have stock or are otherwise interested in the Louisiana & Pacific Railway Company, and a larger amount of whom have no interest in any of the lumber companies, petitioners in this case. (Vol. V, p. 11.)

The Louisiana & Pacific Railroad is well constructed, and in this respect is equal to the other trunk line railroads in Louisiana.

HISTORY OF THE BUILDING OF THE ROAD AND REASONS WHY IT WAS BUILT.

About the year 1900 and from that date up to the present time, but more particularly from 1900 to 1906, Mr. R. A. Long and Mr. C. B. Sweet, with associates, forming corporations, were purchasing tracts of yellow pine timber in what was then Calcasieu Parish, Louisiana, now divided into four parishes.

They acquired this timber in large tracts, sometimes as much as 50,000 acres at a time, between DeRidder and Lake Charles, the distance between the two points being 45 miles.

They organized mill companies and were known generally as the Long-Bell Lumber Company.

The mill companies in Calcasieu Parish were the King-Ryder Lumber Company, with mill located at Bonami; the Hudson River Lumber Company, mill located at DeRidder; the Calcasieu Long Leaf Lumber Company, mill located at Lake Charles. Later on the Longville Lumber Company located a mill at what is now Longville, and built up a town at that point.

The Kansas City Southern Railroad was the only line to which these companies could deliver their tonnage, and this company did not have the facilities to handle the tonnage even of the two mills at DeRidder and Bonami.

The Hudson River, King-Ryder and Calcasieu companies by 1904 had something over 300,000 acres of timber land. Other companies between DeRidder and Lake Charles had large bodies of timber land. The Fulton Lumber Company, south of DeRidder,

had 2,500,000 feet; the Brown Lumber Company had quite a lot; the Hodge-Fence Lumber Company had 150,000,000 feet; the Central Coal & Coke Company had 400,000,000 feet.

It is very apparent then that a railrad running from Lake Charles to DeRidder, and touching the mill towns in that section and connecting all these mills with the five trunk line railroads at DeRidder, Bonami, Fulton and Lake Charles would be a good railroad proposition. It would be a good railroad proposition from the standpoint of the railroad securing the tonnage for transportation, and it would be a good thing for all the mill companies, because such a road furnished them an outlet over five trunk line systems, instead of keeping them tied up to the particular trunk line road which passed through the town where the mill was located.

In addition there was a narrow gauge logging road extending from a point on the north bank of the Calcasieu River, a distance of about 22 miles north, which road bed could be used as a part of the railroad between DeRidder and Lake Charles.

Mr. Sweet and Mr. Long and associates, therefore, began the construction of a railroad from DeRidder to Lake Charles, and by about October, 1906, they had surveyed the entire line, had maps and profiles, had made soundings at the river and surveys across the swamp, had purchased and had on hand 40 miles of 60-pound rail, had the road built and completed for seven miles and the right of way graded and cut through for about 20 miles, when negotiations were opened up by the Southern Pacific concerning the sale of the road and right of way between DeRidder and Lake Charles to the Southern Pacific interests.

The negotiations resulted in the Southern Pacific buying this right of way, and so much of the road as was constructed, including the narrow gauge road, for which the Southern Pacific paid the cost, amounting to about \$490,000, and entered into the contracts set out on pages 188, 189 and 202, by virtue of which the Southern Pacific owned the road, but the Louisiana & Pacific reserved the right to operate over it upon the payment of 25 cents per train mile and 60 per cent. of the station expenses, except for the Louisiana & Pacific's separate station at Lake Charles, for which the Louisiana & Pacific paid the entire operating expenses.

The lines of railroad extending from DeRidder to Bundick, from Lilly Junction to Walla, from Fayette to Camp Curtis were acquired and retained by the Louisiana & Pacific, and in connection with the joint trackage right between DeRidder and Lake Charles they constitute a system of railroad now serving the parishes of Vernon, Beauregard and Calcasieu and the timber and agricultural tributary to the line of road, including therein timber and agricultural interests in Allen and Jeff Davis parishes, also constituting an aggregate of 78 miles of main line and 8.8 miles of yard and side tracks, and over this road and its connections lumber and forest products, and all kinds of merchandise, and agricultural products, are shipped from and to every state in the Union and to many foreign countries, its export business being very large.

Based on the ability to secure transportation for their timber and lumber over this Louisiana & Pacific system, the mill companies along its line have

invested large sums of money not only in the plants and timber, but in steel rails and tram roads, by which these companies bring their logs to the Louisiana & Pacific rails, the investment in steel alone being \$289,000, and the mileage of such tram roads being 73½ miles.

This investment and mileage is by the four lumber companies petitioners herein alone.

The Brown Lumber Company also have quite an investment at Bannister, and other similar companies have mills on the road, and not only the industries located in the various cities and towns on the line, but the farming community and country stores as well ship a large amount of merchandise and farming products over the road. (See statement attached at page 238 of the record.)

The mill companies alone have invested in plants and timber tributary to this road nearly \$20,000,000.

BLANKET RATES AND DIVISIONS.

In the territory traversed by the Louisiana & Pacific Railway what is known as the "Blanket System" of rates, as applied to lumber, prevails.

This blanket rate embraces the territory on and south and west of the Arkansas River, beginning at Little Rock and west of the Mississippi River, to the Gulf of Mexico, and includes the south half of Arkansas, all of Louisiana and Texas.

The blanket rate system is the result of an effort on the part of the trunk lines of the Southwest to enable the yellow pine industry to compete in the North with the woods of Wisconsin and Michigan and the Northwest.

This system has existed and grown up during the last 25 years and under that system all the producing points within the blanket territory enjoy the same rate to certain territories of consumption.

To illustrate, the rate on yellow pine lumber from the Arkansas River to the Gulf of Mexico, when shipped to St. Louis, is 19 cents per cwt.; to Kansas 24 cents and to Chicago 26 cents.

Prior to May 1, 1912, the date of the entry of the order complained of in this case, the rate from all points on the Louisiana & Pacific Railway to St. Louis on yellow pine lumber was 19 cents per cwt. Immediately after that date all rates between the trunk lines and the Louisiana & Pacific were canceled and since that date the rate is 24 cents instead of 19 cents; that is to say, the rate is arrived at by adding the local rate of the Louisiana & Pacific, of 5 cents, to the rate of 19 cents, made by the trunk line railroads.

In connection with this blanket rate system the practice was in effect of allowing divisions out of the through rate and the making of joint rates and through routes. This practice was in effect long prior to the construction of the mills on the Louisiana & Pacific and prior to the construction of that railroad, and continued in effect until the promulgation of the order of the Commission herein complained of and still continues in effect except as to those railroads affected by such order of the Commission.

Milling in transit is a universal custom and has long been approved by the Interstate Commerce Commission, as applied to logs, as well as other

things, and is still approved by the Interstate Commerce Commission except in the case where the Commission conceives that the stockholders of a railroad company are also stockholders of the lumber company.

As a result of the opinion and order complained of herein, the trunk line railroads canceled through routes and joint rates with the Louisiana & Pacific and refused to allow it any division of the blanket rate.

The divisions theretofore allowed by the trunk line railroads with the Louisiana & Pacific are shown in a general way on pages 121 and 122 of the record.

The Louisiana & Pacific Railway filed its tariffs and concurred in tariffs in the same manner as any other railroad company, and in accordance with the rules and regulations of the Interstate Commerce Commission. See also tariff indexes and division sheets. (Vol. V, p. 41.)

The tariff rule in reference to milling in transit on lumber provides:

On shipment of logs and lumber originating at stations on the Louisiana & Pacific Railway and the Woodworth & Louisiana Central Railway, transported to milling points on those lines for further manufacture and transportation to points to which no through rates are provided in the joint tariffs of these companies and connecting lines, a charge of 5 cents per 100 pounds will be assessed on the weight of the milled product forwarded, which charge will include the transportation of the logs, or lumber, into the milling point and the delivery of the product to the connecting line.

Where through rates are provided, same will include the transportation of the logs, or lum-

ber, into milling points on these lines for the purpose of sawing, resawing or further manufacturing into articles described in the joint lumber tariffs of these companies, and through rates will apply from point of origin to final destination of the product shipped.

These tariff provisions relating to milling-in-transit are found in tariffs on file and testified to by witnesses Davis and McLane. They are the usual milling-in-transit arrangements in vogue in lumber producing territory on all rail lines, both trunk line and short line carriers. They have often received the approval of the Interstate Commerce Commission. On the Louisiana & Pacific, as shown by the testimony herein, the average log haul is 30 miles and at the time of the investigation by the Commission the average haul on the finished product was 20 miles. The tariffs covered both the log haul and the haul on the finished product, the average divisions allowed out of the through rate, as testified to by witness Davis, being about 3.9 cents per 100 pounds. The testimony shows that according to rate territory to be reached and the varying car supply afforded by the several trunk line connections, the shipments of lumber moved from the two mills at De Ridder and Bonami respectively, either to the Kansas City Southern at that point, the G. C. & S. F. Ry. at De Ridder, or to the Frisco connection at Fulton, or to the Louisiana & Western (Southern Pacific), St. Louis, Watkins & Gulf (Iron Mountain), or Kansas City Southern at Lake Charles. In the same way the lumber moved out from the mill at Longville and from the mill at Lake Charles. An inspection of the record shows that much of this lumber moved the

entire length of the main line branch of the Louisiana & Pacific, or a distance of 43 miles; that a purely transportation service of great extent therefore is shown not only in the log movement to the mill, but in the movement of the manufactured product out from the mill through the various trunk line arteries to the markets of the world, is apparent. There is absolutely no testimony in the record which shows, or tends to show, that the Louisiana & Pacific Railway Company performs any plant or inter-work industrial or milling service. The tram lines of the Lumber Company, owned and operated by the Lumber Company, branch out from the ends of the several lateral lines of the Louisiana & Pacific and deliveries of the logs are made by the Lumber Companies at these points of connection to the Railway Company, there being no operation of the Railway Company over the tram lines of the Lumber Company, or operation of the equipment of the Lumber Company over the rails of the railway common carrier. The testimony therefore, in brief, shows a permanent and substantial railway line, equal in all its physical characteristics to the trunk lines in its vicinity, well equipped with a sufficient equipment of rolling stock and cars, doing no industrial or inter-plant service, hauling lumber in large quantities for a distance of 43 miles, with an average haul, as stated, of over 20 miles and an average haul of 30 miles over on the logs.

The testimony further shows that while a very few individual stockholders own, absolutely and of their own right, the stock of the Louisiana & Pacific Railway Company, a large number of individual stock-

holders own the stock of the Calcasieu Lumber Company, the Longville Lumber Company, the King, Ryder Lumber Company and the Hudson River Lumber Company. The stock of each of which Lumber Companies is held by different individuals and in different proportions, great numbers of these stockholders holding stock in large amounts in the different companies, having absolutely no interest in the railway investment. Notwithstanding this unchallenged condition, the Interstate Commerce Commission holds that the service of the Louisiana & Pacific Railway Company, which company is chartered as a common carrier under the laws of the State of Louisiana, made a common carrier by the constitution and laws of that state, holding itself out as such, and transacting a large and constantly growing common carrier business for the public at large, rendering obedience to, and compliance with, all of the laws of the State of Louisiana and the United States relative to common carriers, is not as to the Calcasieu Lumber Company, the Longville Lumber Company, the King-Ryder Lumber Company and the Hudson River Lumber Company, a common carrier of interstate lumber traffic. As to lumber of those not stockholders in one of the several companies, above mentioned, and as to traffic other than lumber, it is by the same holding a common carrier. The discrimination is evident. The local state rate to the several junctions is 5 cents per hundred weight. The Lumber Companies mentioned, shipping to St. Louis, for instance, pay 24 cents. The Brown Lumber Company shipping from the same point to the same destination under the order of the Commission would pay 19 cents. The discrimination is obvious. The

record shows similar arbitrary and inexplicable discriminations between carriers, as for example, in the same locality is the Gulf & Sabine Company, owned by substantially the same interests as own the Chicago Lumber & Coal Company furnishing the greater part of its tonnage. For a haul of approximately ten miles, this line, of no better construction, with all the governing facts and characteristics in no wise different, is allowed by the same order of the Commission to participate in the through rate to the extent of 1 cent per 100 pounds. Just to the east, in the same territory, the Red River & Gulf, for a haul of 12 miles, is permitted to participate in the through route and joint rate and to receive a division of 2 cents per 100 pounds, the railway being less in extent, less in equipment and performing far less service, its ownership being identical with that of the Lumber Company which furnishes the greater part of the tonnage.

The finding of the Commission that the practice of allowing such a common carrier as the Louisiana & Pacific to participate in a division of the through rate, works a discrimination in favor of those stockholders of such railway who are also stockholders in the Lumber Company, whose products are shipped out over it is wholly without basis of fact and rests wholly on the theoretical deductions of the Commission herein. The testimony upon this subject consists wholly of the unsupported opinions of one or two witnesses utterly without basis of fact. No witness appeared to testify that he was affected injuriously in any market by the competition of any stockholder of a Lumber Company, who was also a stock-

holder in the Louisiana & Pacific Railway Company. The sales agent of a number of lumber companies, whose stockholders also own stock in common carrier Railway Companies, testified that the fact that the Railway Company received divisions did not enter into the selling price of the lumber in any respect whatsoever. Mr. Nelson, the sales agent of the several Lumber Companies affiliated in interest in a general way with the Louisiana & Pacific, testified that he did not know what, if any, division, the Louisiana & Pacific Railway Company received; that while he was a stockholder in some of the Lumber Companies, he owned no stock and had no interest in the Louisiana & Pacific Railway and that the amount of the divisions played no part in the price of lumber. The main witness called upon this issue was John H. Kirby, the principal stockholder of the Kirby Lumber Company, an enterprise substantially owned and controlled by the intervener, the Atchison, Topeka & Santa Fe Railway Company, or its affiliated interests. This witness was unable to show that the interests of its company had been injuriously affected in any territory by competition with those lumber companies whose stockholders were stockholders in common carrier railways receiving divisions. To the contrary, appellee and others similarly interested, sought to prove from Mr. Kirby, and those interested with him, that they were not under sold in any market by the Lumber Companies, whose stockholders were interested in Railway Companies. This record shows that notice to produce figures showing the selling price of lumber in various markets, was given to these interveners and that they were called upon to produce it at the Chicago hearing

herein, and that while they were then and there in possession of the facts and figures necessary to answer the questions propounded, they declined to do so and in this declination were sustained by the Commissioner who was conducting the investigation. It is stated therefore, with entire confidence upon the whole record, that not only does the record fail to show substantial testimony that the divisions heretofore received out of the through rate by the Louisiana & Pacific operated as an illegal discrimination in favor of the several lumber companies above mentioned, but that the record does affirmatively show that the order of the Commission herein operates as an illegal discrimination against the four Lumber Companies mentioned, in that, they are compelled to pay the local rate added to the through rate for the transportation of their products to market, while their competitors, situated upon trunk lines, or upon arbitrarily favored short lines, ship on the through rate. And further that the order of the Commission discriminates directly and arbitrarily in favor of lines similarly situated as to stock ownership and with less of the characteristics of a common carrier than appellee herein.

FACTS AS TO WOODWORTH & LOUISIANA CENTRAL RAILWAY COMPANY.

This road was duly chartered and incorporated as a railroad corporation and common carrier under the laws of the State of Louisiana in the year 1900, with the usual powers and obligations of a railway company.

For convenience it is known as a part of the

Shreveport, Alexandria & Southwestern Railway System, and its executive officers and traffic manager are the same as those of the Louisiana & Pacific Railway Company and the Sibley, Lake Bisteneau & Southern Railway Company.

It files its tariffs under the title:

"Shreveport, Alexandria & Southwestern Railway System, operating Sibley, Lake Bisteneau & Southern Railway Company, Woodworth & Louisiana Central Railway Company, Louisiana & Pacific Railway Company."

For this reason we refer to the record, to the testimony taken in those cases and to our statement of the facts in those cases, insofar as that testimony relates to the blanket rate system, milling in transit, and divisions. And we also refer to the references to the constitution of the State of Louisiana and to the statute quoted in our petition as to the laws of Louisiana governing railroad companies and giving them the power of eminent domain. (For testimony see Vol. 1, pages 787-804, Vol. V.)

About the year 1900, R. A. Long became interested in the Rapides Lumber Company, located at Woodworth, Louisiana. This company had a mill and a large tract of timber land.

This mill was situated on the St. Louis, Watkins & Gulf Railroad, and it had no other railroad outlet. The mill had a narrow gauge tram or logging road running west from Woodworth to its timber, over which logs were brought into the mill.

The St. Louis, Watkins & Gulf at that time (1900) was little more than a logging road. It was then

what the Interstate Commerce Commission would now doubtless designate as a "tap line." It ran through a timber country and was being constructed between Alexandria and Lake Charles, a distance of about 100 miles.

The road bed was in bad condition; their equipment was poor and they did not seem to have working contracts with other lines to the extent that they could give anything like adequate service to their shippers.

Because of this fact of having no adequate railroad facilities some of the stockholders interested in the Rapides Lumber Company organized the Woodworth & Louisiana Central Railway Company, and built a standard gauge railroad from Woodworth to Lamorie, connecting with Morgan's Louisiana & Texas Railway (Southern Pacific System), and the Texas & Pacific Railroad.

The Rock Island System was not in this country at that time, but later, about 1907, built through, thus giving the Woodworth & Louisiana Central connections with that road.

As one of the inducing causes to the Rock Island to build into this country the Woodworth & Louisiana Central Railway Company entered into a contract with the Rock Island, copy of which contract, under mark of Exhibit "A" is attached to and made a part of the petition herein; and under this contract the Woodworth & Louisiana Central Railway Company agreed to give the Rock Island 50 per cent. of the products of the mills on the Woodworth & Louisiana Central line, the Rapides Lumber Company being also a party to this contract.

About the same time there was a similar contract made with the Morgan's Louisiana & Texas Railway & Steamship Company to give that company 40 per cent. of the lumber tonnage; the contracts providing, however, that these companies should receive these percentages in case they were able to furnish cars to transport the freight delivered to them by the Woodworth & Louisiana Central.

They were not, however, able at all times to furnish the cars, and statements filed in evidence in this case show that for the fiscal year ending June 30, 1912, the Woodworth & Louisiana Central Railway Company delivered to

Morgan's Louisiana & Texas.....	488 cars
Rock Island	836 cars
Texas & Pacific.....	93 cars
Iron Mountain	239 cars
Total	1,656 cars

For the fiscal year ending June, 1911, to

Morgan's Louisiana & Texas.....	689 cars
Rock Island	872 cars
Texas & Pacific.....	47 cars
Iron Mountain	141 cars

Total	1,749 cars
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For the months ending December 31, 1912, to

Morgan's Louisiana & Texas.....	510 cars
Rock Island	409 cars
Texas & Pacific.....	27 cars
Iron Mountain	227 cars

Total	1,173 cars
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About 80 per cent. are thus delivered to the railroads at Lamorie and 20 per cent. to the Iron Mountain at Woodworth.

The Woodworth & Louisiana Central between Woodworth and Lamorie was never in any sense a "logging" road, and while there is a little pine timber east of Woodworth it is not being manufactured and does not belong to any individuals or company even remotely connected with the Woodworth & Louisiana Central Railway Company or the Rapides Lumber Company. As shown Vol. V, pages 17-18, the tonnage of outside interests, especially agricultural, was for years 1909 and 1910 very large.

There is also some hard wood east of Woodworth owned by parties in no way interested in these companies, and some of this is now being transported over the Woodworth & Louisiana Central and the Southern Pacific, but the country generally is a very fertile farming country, mostly sugar plantations, and the land is worth from \$50 to \$70 an acre.

When the Woodworth & Louisiana Central Railway Company was organized it took over the logging road which had been constructed by the Rapides Lumber Company and extended this road until it now reaches about 18 miles west from Woodworth. There is very little freight hauled over this narrow gauge road except the logs of the Rapides Lumber Company, although there are some farms on the cut over lands west of Woodworth and some little agricultural products are hauled over the narrow gauge road. These logs are hauled in under the milling in transit system and under tariffs duly filed with the Commission in the same manner as shown in the record in the Louisiana & Pacific case, and as set out in our statement of facts in that case.

The Woodworth & Louisiana Central has the following equipment:

- 1 45-ton locomotive.
- 1 35-ton locomotive.
- 1 box car.
- 99 flat cars.

The investment in equipment amounts to \$27,464.33. Its investment in track and track material is \$77,918.

It owns its right of way in fee simple.

The Woodworth & Louisiana Central received from connecting carriers for the fiscal year ending June 30, 1911, merchandise as follows:

From the Morgan's Louisiana & Texas	381,162 lbs.
From the Texas & Pacific	190,335 lbs.
From the Rock Island	213,048 lbs.

For the fiscal year ending June 30, 1912:

From the Morgan's Louisiana & Texas	353,417 lbs.
From the Rock Island	413,830 lbs.
From the Texas & Pacific	114,440 lbs.

It received from shippers and delivered to its connecting lines merchandise as follows:

For the fiscal year ending June 30, 1911:

To the Morgan's Louisiana & Texas, from the Rapides Lumber Co.	11,575 lbs.
Others	240,000 lbs.
To the Texas and Pacific, from the Rapides Lumber Co.	nothing
From others	2,242,086 lbs.
To the Iron Mountain, from Rapides Lumber Co.	nothing
From others	65,000 lbs.

For the fiscal year ending June 30, 1912:

To the Morgan's Louisiana & Texas, from Rapides	4,264 lbs.
From others	60,000 lbs.
To the Texas & Pacific, from Rapides Lumber Co.	864 lbs.
From others	4,020,000 lbs.
To the Rock Island, from Rapides Lumber Co.	210,000 lbs.
To the Iron Mountain, from others	114,000 lbs.

It was shown that there was no occasion for using a railroad in connection with manufacture of lumber at the Rapides Lumber Company's mill from the time the logs were put in the pond until the finished product goes out. That is to say, the railroad is not used as a plant facility.

The statement or report made by the Interstate Commerce Commission in reference to the Woodworth & Louisiana Central road (shown on page 327 of the 23 I. C. C. Reports), is not a fair statement at all in reference to this road. The statement as in the Louisiana & Pacific, appears to have been written to fit a preconceived theory. The statement says that:

The tap line and lumber company are identical in interest with the same principal officers.

The stockholders and the officers are not identical, although most of the stockholders in one company are stockholders in the other. Vol V, pp. 18-19.

The Commission says:

Its (Woodworth & Louisiana Central Railway Company) main track, however, is narrow gauge.

The narrow gauge track is not the main track, but

the standard gauge track from Woodworth to La Morie is the main track.

The Commission says that the right of way for the narrow gauge track is leased from the lumber company.

This was true at the time of the hearing by the Commission, but was not true when the report was made.

The Commission says:

But the steel in the unincorporated logging spurs is owned by the tap line and leased to the lumber company as are four narrow gauge locomotives which the lumber company utilizes in the operation of the logging spurs.

This was true at the time of the hearing before the Commission, but on account of the implied criticism of that fact by the Commission this condition was changed by the sale of the equipment, used by the lumber companies, outright to the lumber companies, and the contracts evidencing such sale were filed with the Commission long before the report was written. (See the contracts on file with the Commission.)

In stating the equipment the Commission's report says "9" narrow gauge cars. It should have been "99."

The Commission says the logs are hauled from the end of the incorporated track to the mill by the tap line without charge against the lumber company. The fact is they are hauled under tariffs filed with the Commission.

The Commission says:

The tap line switches the car loads of lumber from the planing mill to the point from which

they are taken by the Iron Mountain, a distance, as the record indicates, of only 25 feet, or less than a car length.

The basis for this statement by the Commission is that it was testified that the Iron Mountain's tracks were within about 25 feet of the planing mill and from this statement the Commission draws the conclusion that the cars need only be switched 25 feet. The facts are that the maximum haul necessary to do the switching to the Iron Mountain is 2,772 feet.

The average switch is about 2,044 feet. (Rec., 22.)

The Commission says:

That 95 per cent. of the lumber is *switched* to La Morie, a distance of six miles.

Six miles is rather a long "switch," and we think "transported" would be a better term.

The Commission says:

The explanation doubtless lies in the fact that the allowances from the Iron Mountain out of the through rates run from $1\frac{1}{2}$ to $5\frac{1}{2}$ cents, while the trunk lines connecting at La Morie allow from 2 to $5\frac{1}{2}$ cents.

We believe we have given a better "explanation" in our statement heretofore showing the reason why the Woodworth & Louisiana Central was built to connect with the Southern Pacific and the Texas & Pacific systems rather than to have only the St. Louis, Watkins & Gulf as a transportation facility.

The Commission says:

There are no joint rates except on lumber.

The tariffs at all times on file with the Commission contradict this statement.

The Commission says:

There was 2,100 tons of outside traffic consisting of merchandise, farm products and miscellaneous material. It does not appear what proportion of this tonnage was intended for employes of the lumber company.

It did appear, however, that this merchandise, farm products and miscellaneous material was *out-bound* tonnage, so it would seem to us to appear very conclusively that the employes of the lumber company were not consuming merchandise and farm products which was being shipped *out*.

As aptly illustrating the discriminating and wholly arbitrary nature of the order in this case, reference is here made to the case of the Red River & Gulf Ry., a short line immediately south of appellee Woodworth & Louisiana Central Ry. (Vol. 1, p. 67-89.) It makes the same connections, was built for the same reasons and presents the same questions of stock ownership. The only substantial difference is that the haul of the Red River & Gulf on the branch is twelve miles and that of the Woodworth & Louisiana Central is six miles. Yet the former is classed as a common carrier, the latter as a plant facility. The former is allowed \$2 per car for switching to the Iron Mountain Ry. and 2 cents per 100 pounds for the movement eastwards to the connection with the Southern Pacific, Texas & Pacific and Rock Island, the latter is allowed nothing for either service. The former can be party to through routes and joint rates, the latter cannot. The Crowell & Spencer Co. (proprietary interest) can ship on the through rate. The Rapides Lumber Co. must pay the through rate plus the Louisiana local rate from the mill to the

junction at LaMorie. (See opinion of Commission, 23 I. C. C. 608.) This rank discrimination has not been and cannot be explained or justified.

**FACTS AS TO MANSFIELD RAILWAY AND TRANSPORTATION
COMPANY.**

The facts as stated by the Commission in the case of the Mansfield Railway & Transportation Company, in its opinion No. 1898, 23 I. C. C. 587, are generally correct, except so far as it deals with the establishment of the spur track from the Kansas City Southern, the removal of the same and the operation by the Mansfield Railway & Transportation Company over its line of railway to the interchange track with the Kansas City Southern and Texas and Pacific Railways. The testimony before the Commission on this point is contained in Volume 3 of the printed record herein, page 2072, and for convenience is set forth verbatim.

Commissioner HARLAN: Well, what is the distance from the planing mill to the main line of the Kansas City Southern?

Mr. FROST: This is the Kansas City Southern. It is just off their right of way, probably 300 feet, but they have got no track connections in there at all, neither has the Texas & Pacific.

Commissioner HARLAN: Did the Kansas City Southern ever have a switch track to your planing mill?

Mr. FROST: They cut in a siding in there temporarily for us when we moved the machinery in, and as soon as that was done it was taken out, because we had our own facilities. We built in there and used our own track.

Commissioner HARLAN: When the De Soto Lumber Company owned that mill, did the Kan-

sas City Southern have a switch track in to the planing mill?

Mr. FROST: No. I say when it was organized, and we commenced to build the mill the Kansas City Southern put in a little siding in here to accommodate us and get the machinery in. We had to unload the machinery; but that was all temporary, and when we built it was taken up.

Commissioner HARLAN: When you say we, you refer to the De Soto Company?

Mr. FROST: Yes, the original company.

Commissioner HARLAN: What is the distance from the planing mill to the junction of the main line of the Mansfield Railway & Transportation Company?

Mr. FROST: I think about 2,000 feet.

In the Commission's report, page 588, it is stated:

The mill is within three hundred feet of the right of way of the Kansas City Southern, with which it was formerly connected by a spur track that was abandoned and later taken up.

And on page 589:

As stated, the spur track of the Kansas City Southern, about 300 feet long, which formerly went directly into this mill, was torn out; the switching is now done over a track of the tap line three-fourths of a mile long. This arrangement being effected, the Kansas City Southern thereupon undertook to pay the tap line allowances of 1 to 4 cents per 100. We hold this to be a mere manipulation of the situation in order to establish a relation that is unlawful. The tap line also crosses the right of way of the Texas & Pacific within a short distance from the mill, but the lumber is switched by the tap line back toward Mansfield and then to the junction with that line, a distance of about two and a half miles; the tap line receives from the Texas & Pacific 1 to 4 cents per 100 pounds. In this case we regard any allowance as unlawful.

It is thus apparent, from the testimony before the Commission, that there was no basis whatever for a finding that there was any manipulation by the Mansfield Railway & Transportation Company, the Frost-Johnson Lumber Company, or their predecessors, or by either of the trunk line railroads "in order to establish a relation that is unlawful." There was no inquiry before the Commission as to the purpose or intent of any person. There was not a particle of testimony of any sort which would warrant any such finding by the Commission as is set forth in its report. In no way was there any indication that any suspicion was entertained as to the good faith of any party in the construction of the spur track from the Kansas City Southern. The testimony before the Commission on the point is a frank statement of fact. It is a common occurrence that a spur track is taken up. Furthermore the testimony before the court shows that the location of the spur was impracticable and unsafe. The Kansas City Southern had consented to install the spur for the sole purpose of allowing the machinery to be placed as near to its permanent location as railroad track would warrant. The Mansfield Railway & Transportation Company was extending its line so as to serve the mill and give it an outlet to both of the carriers. This was done at a time when the railroads were giving allowances on lumber which was never handled by the mill or the affiliated tap line and there was therefore no necessity whatever for making any change in order to secure an allowance. The finding of the Commission is gratuitous and unwarranted and inasmuch as it appears to be the sole reason for refusing to require the establish-

ment of joint rates from Oak Hill on the lumber of the Frost-Johnson Lumber Company, the order should be set aside.

In addition to the foregoing, we desire to call the court's attention to the opinion of the Commission in the *Tapline Case*, so far as it relates to the Deering Southwestern Railway Company, 23 I. C. C. 630, where the facts show a situation similar to those above discussed in connection with the petitioner, Mansfield Railway & Transportation Company. The Deering Southwestern Railway Company and the Wisconsin Lumber Company, located on that line of railway, are both owned by the International Harvester Company.

We quote from the Commission's opinion just referred to:

At the time of the hearing the tapline switched the lumber to the Frisco at Deering Junction. But with the extension of the track the plan contemplated was the delivery by the tapline of the lumber of the proprietary company at Blazer, seven miles east of the mill. We are given to understand that the operating conditions of the branch of the Frisco connecting with this tapline at Deering Junction are such as to make it no longer practicable to receive the lumber at that point.

And on page 631:

For its service in hauling the products of the mill of the controlling company to the Frisco at Blazer, a distance of seven miles, we fix 1½ cents as the maximum division that may lawfully be paid to this tapline out of the rate.

Solely because it was impracticable to continue making a delivery at Deering Junction the Commis-

sion authorized an increase in the division theretofore received by the Deering Southwestern to $1\frac{1}{2}$ cents per hundred pounds. In one or the other of these cases the Commission has made a mistake. It grants an allowance of $1\frac{1}{2}$ cents on a representation that it was impracticable longer to continue making delivery at Deering Junction as was the practice at the time of the hearing before the Commission, while in the case of the petitioners there was no possible method of making delivery other than as was done and which the Commission finds to be "a mere manipulation of the situation in order to establish a relation that is unlawful." In substance, the Commission holds unlawful any allowance because at one time there was a connection within 300 feet to the Kansas City Southern and a crossing of the Texas & Pacific line within one thousand feet of the mill, although there never was an interchange of traffic at either place within the last six or eight years. In fact, from the time lumber was produced there has been no other way in which to ship lumber other than over the Mansfield Railway & Transportation Company's line. We make no harsh criticism of the Commission's action in this case when we say, that the holding is in its essence the exercise of an arbitrary power. Certainly it is most unreasonable to forbid the Mansfield Railway & Transportation Company to receive compensation out of the joint rate for the haul actually performed on the lumber of the Frost-Johnson Lumber Company, when there is no other possible means of transportation by rail. The Commission's statement of fact does not completely set forth the data contained in the statistical testimony filed with the Commission. The court's

attention is specially directed to the tables, Vol. V, pages 20-21, showing the large and increasing outside tonnage of this carrier for the years 1909, 1910 and 1911, and the large public which is served by it.

In addition to what the Commission sets forth, we call attention to the fact that during the year ending June 30, 1912, the Mansfield Railway & Transportation Company carried 8,870 passengers and 47,095 tons of freight, divided as follows:

Tonnage originating on the line of the petitioner:

Products of agriculture	2,734 tons
Products of forest	19,134 tons
Manufactures	316 tons
Merchandise	1,949 tons
Miscellaneous	10 tons
	<hr/>
	24,143 tons

Received from connecting roads and other carriers:

Products of agriculture	5,849 tons
Products of mines	7,669 tons
Products of forests	3,373 tons
Manufactures	2,648 tons
Merchandise	3,231 tons
Miscellaneous	182 tons
	<hr/>
	22,952 tons

It will thus be seen that there is almost an even balance between tons originated and tons received from connecting lines. It is further shown that the Frost-Johnson Lumber Company received 900 tons of freight on which revenue was \$332.30, and forwarded shipments aggregating 11,898 tons, on which revenue was \$11,226.45. The total movement therefore, for the Frost-Johnson Lumber Company was

13,698 tons. During the same period for other shippers there were received 7,327 tons on which the revenue was \$3,093.32, and forwarded 3,143 tons on which the revenue for \$2,334.64. The total tonnage received and forwarded for all parties other than the Frost-Johnson Lumber Company during the four months ending October 31, 1912, was 10,470 tons. It will thus be seen that out of a total tonnage handled during the four months of 23,554 tons, practically 45 per cent. was for parties other than the petitioner, Frost-Johnson Lumber Company. Here is a railroad organized in 1881 serving a large and important community. Almost one-half of its tonnage is for parties other than the affiliated lumber company. The testimony shows, beyond all question, that in the manufacture of logs into lumber by the Frost-Johnson Lumber Company, the Mansfield Railway & Transportation Company performs no service that is not performed by trunk line railroads for mills along their lines. There is a holding out to the public of a service of carriage for hire. All the public demands, by way of transportation is furnished by the Mansfield Railway & Transportation Company without discrimination and we therefore submit that the Mansfield Railway & Transportation Company meets every test that should be applied to a common carrier.

FACTS AS TO VICTORIA, FISHER AND WESTERN RAILWAY.

The portion of the opinion of the Interstate Commerce Commission of date April 23, 1912, applicable to the Victoria, Fisher & Western Railroad, is found on pages 602 and 603. The Commission therein says:

We cannot recognize the right of this tapline to participate as a common carrier in joint rates on the product of the mills of the proprietary company. The lumber rate of the Kansas City Southern must be held to apply from the mill at Fisher and the rate of the Texas & Pacific from the mill at Victoria. Each of those lines may arrange with the lumber company to perform the necessary switching and service for the distance of one-half mile and one mile respectively and may make it a reasonable compensation under Section 15.

The testimony taken at the original hearing is found in Volume 2 of the printed record herein, pages 1566-1582. The material conditions have undergone but little change since the original hearing except that there has been a slight increase in tonnage originating from outside sources. The Victoria, Fisher & Western Railroad Company was incorporated as a common carrier of freight on the 5th day of November, 1902, having been purchased from the Louisiana Long Leaf Lumber Company which had bought the road many years prior thereto. The stock ownership of the road corresponds generally speaking with that of the lumber company with the exception of one stockholder who owns a substantial interest in the railway and owns none in the lumber company and another who owns stock in the lumber company without any corresponding

interest in the railway company. The railway is standard gauge and of substantial and permanent construction. It extends from the Town of Victoria on the Texas & Pacific Railway in a southwesterly direction to the Town of Fisher on the Kansas City Southern Railroad, a distance of approximately 25 miles. At Fisher, intersecting the Kansas City Southern Railway, it further extends in a generally southwesterly direction to the Town of Cain, approximately five miles further, making a total distance from Victoria to Cain of 30 miles. At Victoria there is located a pine lumber mill, the distance from the loading platform to the interchange track with the Texas & Pacific being five-tenths of a mile. At Fisher there is located a pine lumber mill and also a hard wood mill, the distance from the loading platform of the pine lumber mill to the interchange track with the Kansas City Southern being seventy-seven one-hundredths of a mile and from the hard wood loading platform to the interchange track with the Kansas City Southern being one and forty-seven one-hundredths miles. The railway represents an investment up to June 30, 1912, of \$406,471.79. It would cost in excess of \$500,000 to reproduce the property in its present state. It is constructed of forty and sixty-pound rails and compares favorably with trunk line railways in that vicinity. It owns its own track scales and is well equipped with working forces, both as to section laborers and the usual officers and agents of an operating railway. Its equipment consists of five locomotives, three box cars, one flat car, one hundred and twenty-five logging cars and four caboose cars of the total value of \$86,501.38. Having been incorporated

as a common carrier of freight it has continuously held itself out to the public as a common carrier; has actually received and transported freight for the public continuously since its incorporation and as found on pages 39 and 40 of printed transcript of testimony taken in the Commerce Court and in the testimony at the original hearing above referred to, does a substantial business, both tonnage and revenue, for the outside public. It is recognized as a common carrier by the Railroad Commission of Louisiana; is taxed by the State of Louisiana as such and makes all reports to said Commission and complies with all of the laws of the State of Louisiana applicable to common carriers. It has always, since its creation, complied with all of the federal laws applicable to common carriers paying an income tax as such, complying with the safety appliance laws, making all reports required by the Interstate Commerce Commission and duly filing and publishing tariffs of interstate rates as required by law. It has hitherto published full lines of class and commodity rates and until prevented by the order complained of herein, participated in through routes and joint rates to interstate points on lumber and other forest products. The country through which the line extends, as testified to by Mr. Shelby Taylor, member of the Railroad Commission of the State of Louisiana, is a well developed agricultural section. The soil is good and can be developed into one of the finest farming countries of the state. The land is level and well drained. In addition to the pine lands it is a fine hard wood timber section. There are farms along the entire

extent of the railway, with schools and other developments incident to an agricultural country. There is also located a cannery on this land, nine miles south of Victoria. As illustrative of the fertility of the soil it may be mentioned that during the past year there was raised on that line 90 bushels of corn per acre. For the years ending June 30, 1910, 1911 and 1912, the freight revenues were respectively \$119,282.22, \$96,522.32 and \$82,275.93. The operating expenses for the same years were respectively \$100,093.22, \$102,591.56 and \$76,159.48. As shown, Vol. II, page 1571, the outside tonnage for both forest products and other freight at the time of the hearing was considerable.

The Louisiana Long Leaf Lumber Company owns valuable mills situated at Victoria and Fisher, as above stated and ships out annually approximately 40,000,000 feet of lumber, representing 2,000 carloads per year. Some of this lumber moves from Victoria, where the Victoria, Fisher & Western Railroad connects with the Texas & Pacific, over the line of the Victoria, Fisher & Western to Fisher on the Kansas City Southern and in like manner lumber from both the pine mill and the hard wood mill at Fisher moves from the mills there over the Victoria, Fisher & Western to a junction with the Texas & Pacific at Victoria. There is thus a haul of 25 miles on the finished product each way. The greater movement over the entire length of the Victoria, Fisher & Western is from Fisher to Victoria, for the reason that the hard wood mill is located at Fisher. There are therefore deliveries from each mill to the trunk line near which it is situated and also to the trunk

line situated at the other terminus. This movement is due to three causes. First, it often occurs that cars at Victoria, for instance, cannot be obtained from the Texas & Pacific Railway Company. They are therefore obtained from the Kansas City Southern and the empty cars hauled from a connection with that line at Fisher to the Victoria mill and the loaded cars hauled back from Victoria to Fisher. This also occasionally happens when the Kansas City Southern Railroad Company is not able to furnish cars for the products of the mills at Fisher. The cars are then obtained from the Texas & Pacific and are hauled empty from Victoria to Fisher and loaded back. Second, there is at times a better line of rates to some territory in connection with the Texas & Pacific than can be obtained by the Kansas City Southern. In other words, territory can be reached through the Kansas City Southern gateway. As, for instance, Oklahoma stations on the Frisco can be reached through the Kansas City Southern on a lower basis than in connection with the Texas & Pacific. Again the Texas & Pacific operates a larger line of rates into Texas, and can get into Texas to a larger number of stations on a basis that would enable them to compete through the Texas & Pacific than they can via the Kansas City Southern. New Orleans cannot be reached at all by the Kansas City Southern except by a combination of locals. That line publishes no through rates to New Orleans. The Kansas City Southern on the other hand operates a line of export rates to Port Arthur, while the Texas & Pacific has in no export rates to that point. It is therefore often necessary for the mills at Fisher to use the Texas & Pacific gateway, and

for the mill at Victoria to use the Kansas City Southern gateway, involving in each case the haul of 25 miles for the empty car and 25 miles for the loaded car. Third, different sizes and kinds of lumber are manufactured at the different mills and it occurs that lumber ordered from points to be reached via the Texas & Pacific must be furnished from the Fisher mills and that ordered from Kansas City Southern points must be furnished from the Victoria mill. For this movement the order of the Commission forbids compensation of any character. Prior to the effective date of the order herein complained of, the Victoria, Fisher & Western was a party to through rates and joint tariffs with the Texas & Pacific and the Kansas City Southern, receiving divisions of the through rates from these connections. With the Kansas City Southern the divisions ran from three-fourths of a cent to 4 cents per hundred pounds on lumber and from 2 to 3 cents per hundred pounds with the Texas & Pacific. The 4 cents received from the Kansas City Southern applied only to business for local stations on the Kansas City Southern, north of Neosho. To all stations on the Kansas City Southern except Fort Scott where 4 cents were received, and to stations on its connecting lines the division received varied from three-fourths of a cent to 2 cents. In connection with the Texas & Pacific 3 cents was received on business to points on the Texas & Pacific and to all other stations where through rates were obtained 2 cents was allowed. See Tariff Index I. C. C. 5. The milling-in-transit arrangement applied in these tariffs. There is no testimony in the record that the Victoria, Fisher &

Western Railroad Company performs any inter work or plant facility service for the mills of the Louisiana Long Leaf Lumber Company. To the contrary, neither the railway company nor any of its facilities in the way of engines, etc., are used in any way in the inter work or inter mill service of the mills. The railway company hauls the lumber from the mills to the Kansas City Southern on the one side and to the Texas & Pacific upon the other. It also hauls logs into the respective mills. The testimony clearly shows that the construction of this railway and its operation was purely a transportation and not a plant facility proposition.

The testimony shows a well equipped and permanently constructed railroad, chartered as a common carrier, holding itself out as such, treated as such by the State of Louisiana, and its trunk line connections, and actually performing the duties of a common carrier, for an agricultural section not otherwise provided with transportation facilities. It carries pine and hard wood lumber 25 miles, logs in some cases in excess of that distance. Except for the fallacy which pervades the entire opinion of the Commission, that its stockholders being stockholders in a lumber company, cannot own stock in a railroad, there is nothing in the entire record to justify the denial to it of compensation for purely transportation services actually performed.

Respectfully submitted,

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
Solicitors for Appellees.

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JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 837.

October Term, 1913.

**UNITED STATES and INTERSTATE COM-
MERCE COMMISSION,**

Appellants,

vs.

BUTLER COUNTY RAILROAD COMPANY,

Appellee.

BRIEF FOR APPELLEE.

WM. A. GLASGOW, JR.,

JAMES M. BECK,

Counsel for Appellee.

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IN THE
Supreme Court of the United States.

October Term, 1913. No. 837.

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

vs.

BUTLER COUNTY RAILROAD COMPANY,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT.

A.—The Butler County Railroad Company, Appellee, is a corporation organized under the Railroad Statute of the State of Missouri (Record p. 11), and was and is engaged, as a common carrier, in the transportation of persons and property, both in intrastate and interstate commerce, and at the time of the proceedings referred to in this cause, the Appellee was operating thirty-five miles of railroad, part of which it owned and part of which was operated under arrangement, contract or agreement with parties owning the same. The

incorporation and methods of Appellee in the conduct of its business are set forth in the Bill (Record pp. 1-2). This Railroad is characterized as a "patchwork" railroad in the brief for the United States, although the Commission found it to be a common carrier, subject to the Act to Regulate Commerce, as hereinafter shown.

B.—Prior to and at the time of the proceedings before the Interstate Commerce Commissioner hereinafter referred to, the Appellee was engaged in the transportation of lumber and forest products, as well as all kinds of class and commodity traffic, to and from points on its road in the State of Missouri, to and from points in other States, on "through routes and joint rates" established by Appellee and the St. Louis, Iron Mountain and Southern R. R. Company and the St. Louis & San Francisco Railroad Company and connections, and tariffs covering such rates were duly filed with the Interstate Commerce Commission and had been in effect for some years, and such tariffs as to lumber and forest products provided for "a milling in transit privilege to all mills located on the line of the Butler County Railroad, and the joint through rates were divided between the Butler County Railroad and its connections upon terms satisfactory to them and fair and reasonable so far as all other persons were concerned." (Record, pp. 3-4.)

The milling in transit privilege above referred to was available to all shippers of logs over the line of the Butler County Railroad, and which logs were manufactured into forest products taking lumber rates, including lumber, handle stock, sucker rods and cooperage stock, at mills on the line of said road, the product being then transported over the Butler County Railroad and its connections, on the through routes and joint rates, to the markets, at destination: (Record, p. 4).

For illustration: The lumber rate from all points on the Butler County Railroad (except Poplar Bluff, which was the junction point with other railways), to St. Louis, was 12 cents per 100 pounds, and to Thebes was 10 cents, both being 2 cents per 100 pounds above the rate over the Trunk Lines from the Junction at Poplar Bluff. The rates to St. Louis, Thebes and Cairo, from points on the Butler County Railroad (other than Poplar Bluff), were 2 cents above the junction rate so as to be on a parity with rates from points on the Trunk Lines, beyond the junction point and about equal in distance with the points on the Butler County Railroad, to the Mississippi River crossings and points of destination. The divisions to the Butler County Railroad are shown in the Record p. 55—Exhibits 8 and 9. The rates *on lumber and cooperage* stock were made to apply from points on the Butler County Railroad where the *logs* were received by that company, from the shipper, and if the milling in transit privilege was availed of by the shipper, he was required to pay $1\frac{1}{2}$ cents per 100 pounds to the Butler County Railroad Company on the logs, in addition to the lumber rate, when made into lumber, and 1 cent per hundred pounds when made into cooperage stock. About four and one-half cars of logs make one car of lumber, and compensation was made to the Butler County Railroad Company for hauling each of the four and one-half cars of logs, about 27 miles to the mill at Linstead, and one car of lumber from the mill to the junction by giving to that company its division out of the joint rate on the lumber and the payment aforesaid on the logs for the milling in transit privilege.

The same tonnage of lumber movings from the mills, was in the logs where they were received for

transportation by the Butler County Railroad, and therefore by joint tariffs the lumber rates were applied from the point where the logs, containing the lumber, were received for transportation. But the Butler County Railroad performed a service not covered by the lumber rates, in that it carried the tonnage of logs, cut away at the mills, to produce the lumber and therefore there was paid to it, by the shippers, for the milling in transit privilege, $1\frac{1}{2}$ cents per 100 pounds, on the logs.

No allowances were made to anybody for bringing logs to the stations on the Butler County Railroad, but the rates applied on the lumber from the stations on the Butler County Railroad; (see Record, p. 55, "Exhibit No. 9"). No complaint was ever made, either as to the fairness of the rates, the divisions thereof, or as to the milling in transit privilege, which was in the usual form, and like provisions have been many times approved by the Interstate Commerce Commission.

The rate on cooperage stock to New York was 35 cents per 100 pounds; Philadelphia, 33 cents; Boston, 37 cents; and New Orleans, 17 cents; which were the same rates as from Poplar Bluff, the junction point, and the same as made by the Trunk Line carriers from all points in southeastern Missouri and Arkansas, to and including Texarkana, Arkansas, and of course, rates from points on the Butler County Railroad had to be on the basis of the group rates of the Trunk Lines; and of these rates the Butler County Railroad Company received as its division thereof, 3 cents per 100 pounds. As there were many participating carriers, and the distance was greater the Butler County Railroad Company necessarily received less in the division, than on a short haul to the Mississippi River points. The rates on lumber

to these points were 2 cents higher than the above rates, but lumber did not move to these markets. Cooperage stock is made from the low grade of timber, to wit, gum; while lumber is made from the high grade timber, to wit, white oak, red oak, hickory, ash and cypress. The same provision covering the privilege of milling in transit applied on these rates.

C.—The entire capital stock of Appellee is held by trustees for the benefit of the Brooklyn Cooperage Company, and the capital stock of the latter company is held and owned by the American Sugar Refining Company. The Brooklyn Cooperage Company, at the time of the hearing before the Commission, was engaged in cutting timber, for cooperage, at points adjacent to the line of road of Appellee, some, (not all as incorrectly stated in the Brief for the United States p. 30), of the timber being from land of the Great Western Land Company and some from lands owned by other people, the stock of which company is held by the American Sugar Refining Company—(Record pp. 16, 20)—other mills (Quercus Lumber Co., Putnam Hickory Mill and Oil Well Supply Co.) buy logs from the Great Western Land Company (Record pp. 23, 24)—and the mill of the Brooklyn Cooperage Company and other mills are located at Linstead, on the line of Appellee, within a mile of the junction point between Appellee and the St. Louis, Iron Mountain and Southern Railroad and the St. Louis & San Francisco Railroad. There were other parties also engaged in cutting timber at points adjacent to the line of road of Appellee, and also milling such timber at points at or near Linstead, aforesaid. The Brooklyn Cooperage Company owned its own logging tracks over which it brought logs to the stations or sidings of the Butler County Railroad,

which latter Company did not operate its locomotives over said tracks, made no allowance for the bringing of logs to its stations or sidings, and was engaged in the transportation of such logs, only after they were brought by shippers up to the stations or receiving tracks on its road.

In the Brief for the United States it is stated at page 31:

“For the benefit and advantage of the American Sugar Refining Company the rate from Poplar Bluff to New York and New Orleans on coo-
perage material is 2 cents less than the rate from all other points on the line of Butler County Railroad Company. (R. 62, 64.)”

We know that the learned counsel for the United States would not intentionally create an erroneous impression as to the facts of this case, but in their zeal to find something in this record upon which to base an attack upon the American Sugar Refining Company, they have been led to make the above statement which is incorrect in every particular.

The rate “from Poplar Bluff to New York and New Orleans on coo-
perage material” is not 2 cents less than the rate from all other points on the line of Butler County Railroad”. All points on the Butler County Railroad, *including Poplar Bluff*, to New York and New Orleans are grouped on *the same rate*, and this is required because the tariffs of the Trunk Lines, with which Butler County Railroad connects, group all points in that territory on the same rate to New York and New Orleans—being long hauls upon which the slight differences in distance become immaterial.

As to this, the Commission says (Record p. 63):

“The rates from points on the tap line, including the mill at Linstead, are in all cases 2

cents higher than the rates of the Trunk Lines from Poplar Bluff, excepting to *New Orleans and New York*, where most of the cooperage company's shipments actually move; *to those points the Poplar Bluff rates apply from points on the tap line.*"

This clearly shows the inaccuracy of the statement of the learned counsel above referred to.

The learned counsel for the United States at page 31 of their brief continue their inaccurate statement as follows:

"The few independent shippers must pay either the local rate in addition to the charge of the Trunk Line or a through rate that is 2 cents higher than the rate from Poplar Bluff (R. 62, 64)."

This statement seems to refer to the shipment of "cooperage material" to New York and New Orleans, and if so, is inaccurate because, as above shown, the rate to those points is the group rate applying from all points on the Butler County Railroad and is the same as the Poplar Bluff rate.

If this refers to lumber and forest products to St. Louis, Thebes and Cairo, to which joint rates apply—and which are short hauls—the rates from all points on the Butler County Railroad, except Poplar Bluff at the junction, are 2 cents above the junction rate, but the rates are the same to all shippers, whether the Brooklyn Cooperage Company or so-called "independent shippers".

The Commission says (R. p. 63):

"There are also a few independent producers of ties, handle bolts, etc., that team their logs to the saw-mills and ship out their products over the main track of the tap line into Lowell Junction. But such shippers pay either the local rate of the

tap line in addition to the charge of the Trunk Line or pay a through rate that is 2 cents higher than the rate from Poplar Bluff."

The situation is as follows:

1. The Brooklyn Cooperage Company delivers logs to the Butler County Railroad at its station at Bailey's, (for illustration), and pays on the lumber in logs, which is manufactured at Linstead (Poplar Bluff) a through rate 2 cents above the Poplar Bluff rate and also pays for the milling in transit privilege $1\frac{1}{2}$ cents per 100 pounds on the logs from Bailey's to Linstead.

2. The so-called "independent shipper" hauls his logs by team to his mill at Bailey's and there the lumber is manufactured and then if he ships, on joint rates to points on the Trunk Lines, such as St. Louis, Thebes or Cairo, he pays the joint rate, 2 cents above Poplar Bluff, or if to New York or New Orleans he pays the same as the Poplar Bluff rate. He pays nothing on the logs, for he does not use the milling in transit privilege. He pays for teaming his logs to his mill and the Brooklyn Cooperage Company pays the cost of bringing its logs on its own tracks to the station at Bailey's and then pays the $1\frac{1}{2}$ cents per 100 pounds on the logs for the milling in transit privilege, which it uses.

It is impossible that there should be, under the above facts, any unjust discrimination against anybody, and the Commission did not find that there was.

This is the only part of the Brief for the United States, where any effort seems to be made to show that the Butler County Railroad Company was discriminating against anybody, and it must be obvious that the learned counsel have misunderstood the facts.

We do not deem it necessary to correct the very insufficient statement in the Brief for the United States as to the detailed operations of the Butler County Railroad Company, all of which appear in the evidence and the Commission's Report. We are relieved of this by the frank admission of the learned counsel for the United States, in their Brief, p. 84:

"It is fairly to be implied that the Commission found it" (Butler County Railroad) "a common carrier of the products of the proprietary mill."

Of course it would follow that if the Butler County Railroad Company is a common carrier of the products of the "proprietary mill" it is a common carrier as to other so-called "independent shippers".

D.—In a report issued on December 7, 1909 (17 I. C. C. Rep. 338), in what is known as the *Star Grain case*, the Interstate Commerce Commission so expressed itself as to the through routes and joint rates of short line railroads with the Trunk Lines or long line carriers, in general, as to alarm the St. Louis, Iron Mountain & Southern Railroad Company and the St. Louis & San Francisco Railroad Company, and as a result thereof they threatened to cancel the through routes and joint rates and the divisions thereof with Appellee, on lumber and forest products, and as a result of such threat, Appellee filed its petitions before the Interstate Commerce Commission, in which it prayed that the Commission would suspend the operation of certain tariffs and notices which were filed by the carriers aforesaid, cancelling the through routes and joint rates then in effect with the Butler County Railroad Company, on lumber and forest products, and also praying that the

Commission might find that the through routes and joint rates and the divisions thereof, then in effect, were just and reasonable, and might require the observance thereof by proper order (Record pp. 2-3). No tariffs were filed, however, cancelling through routes and joint rates on traffic covered by class rates.

E.—A hearing was duly had upon the petitions of Appellee, as aforesaid, at the same time that the Commission made its investigation in what is known as the Tap Line case, I. & S. Docket No. 11, and at such hearing evidence was introduced by the Butler County Railroad Company, which fully set forth the details of its operations, character and situation, at the time of the hearing, and all of the evidence as to Appellee which was before the Commission (being evidence offered by Appellee), appears in the Record as Exhibit A with the Bill. On the 14th day of May, 1912 (23 I. C. C. Rep. 549), the Commission made its report and finding as to the Butler County Railroad (Record, pp. 62 to 64, inclusive), the closing paragraph of which report is as follows:

“For its services in moving the products of the Cooperage Company’s mill to the Iron Mountain and to the Frisco, a distance of less than one mile, this Tap Line may lawfully receive *out of the rate* nothing beyond a reasonable switching charge, which we fix at \$1.50 per car.”

This finding of the Commission ignored the fact that the service of the Butler County Railroad Company, under the joint tariffs, began at the station on its road where the logs (containing the “products of the Cooperage Company’s mill”) were received, and no provision was made under this finding for compensation out of the joint rate for the service up to the mill,

which was provided for by agreement of the carriers, who were parties to the division of the joint rates.

On the 14th day of May, 1912, the Interstate Commerce Commission entered its order, wherein the connecting carriers of the Butler County Railroad Company were authorized "on not less than three days notice, to reopen through routes and publish joint rates with" the Butler County Railroad Company, "provided the allowance or division out of such joint rates to be paid on the products of the mills of the said proprietary companies", (Brooklyn Cooperaage Company), "shall not exceed the division or allowance specified in the aforesaid supplemental report of the Commission;" (Record, p. 61); which said division was \$1.50 per car; "and it is further ordered that the joint rates hereinbefore authorized may be published on three days notice to the public and to the Commission, the tariffs to refer to this order by date and number, and on like notice any of the said defendants or parties to the record, may republish rates on class and commodity traffic and on products of mills other than those of the respective proprietary lumber companies."

The result of this order was to authorize through routes and joint rates by the Butler County Railroad Company with its Trunk Line connections, the St. Louis, Iron Mountain and Southern Ry. Co. and the St. Louis and San Francisco R. R. Co., which was a finding of the fact that the Butler County Railroad Company is a common carrier, otherwise it could not join in through routes and joint rates and was not subject to the jurisdiction of the Commission; and as to all shippers, the tariffs were to "reopen through routes and publish joint rates" to and from stations on the Butler County Railroad on the terms

and with the divisions theretofore in effect, and with the milling in transit privilege; but this privilege and the joint rates were not to be accorded to the traffic of the Brooklyn Cooperage Company, the only exception among all shippers, because it was characterized by the Commission as a "proprietary company", and therefore a distinction was made based simply upon the fact that the stock of Appellee was held by trustees for the benefit of Brooklyn Cooperage Company, and this is emphasized by the admission of the United States (Brief p. 84) that: "It is fairly to be implied that the Commission found it (Butler County Railroad) to be a common carrier of the products of the proprietary mill."

F.—Subsequently, and on the 30th day of October, 1912, the Interstate Commerce Commission entered its amended order, which is (so far as applicable here) as follows (Record, p. 68):

"6. It further appearing that the following parties to the record, namely" (Butler County Railroad Company), "have heretofore filed with the Commission their several petitions asking for the establishment or re-establishment of through routes and joint rates to interstate destinations, which said petitions or complaints are filed on or consolidated with the record herein, and on which a full hearing has been had;

"7. It is ordered, That the said principal defendants above named be"; (among others, the St. Louis, Iron Mountain and Southern R. R. Company and the St. Louis and San Francisco Railroad Company) "and they are hereby, required, on or before Jan'y. 1, 1913, to re-establish, and for a period of two years to maintain with each of the said parties to the record last above named," (Butler County Railroad Co.) "the through interstate routes and joint rates in effect,

in accordance with their respective tariffs filed with this commission, on April 30, 1912:

"9. Provided, further, That the allowance or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said last-named parties to the record" (Butler County Railroad Co.) "on the products of the mills of the said respective proprietary companies named in said report" (Brooklyn Cooperage Company) "shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission, which are hereby fixed as maximum *divisions or allowances thereon*, until further order, the commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful.

"12. It is further ordered. That the divisions of all joint rates herein required and authorized to be re-established on traffic other than the products of the mills of the several proprietary lumber companies shall be submitted to the commission by the parties hereto for approval."

The result of such amended order was to again find that the Butler County Railroad Company was and is a common carrier, and the defendants were "required on or before January 1st, 1913, to re-establish and for two years to maintain with each of said parties to the record last above named, the through interstate routes and joint rates in effect *in accordance with their respective tariffs* filed with this Commission on April 30th, 1912." (Italics ours.)

This provision required re-establishing the through routes and joint rates theretofore in effect with the Butler County Railroad Company, to and from all stations, *and the divisions thereof, with the*

milling in transit provision above referred to, and which were in effect on the 30th of April, 1912. By this order, however, it was provided that the divisions made out of the joint rates to the Butler County Railroad on the products of the mill of the Brooklyn Cooperage Company, only, "shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the Commission", and which allowance or division was \$1.50 per car, although the allowance or division to Appellee on traffic of all other shippers over the line of the Butler County Railroad, on the through routes and joint rates, with the milling in transit privilege, was required to remain in effect as it was on the 30th of April, 1912, giving to the Butler County Railroad Company its division of the lumber rate as well as its charges on the logs for the milling in transit privilege; and the Commission directed that the divisions of all joint rates required and authorized by its order, on traffic "other than the products of the mills" of the Brooklyn Cooperage Company, should be submitted to it for approval.

By this order there were two affirmative requirements of the Commission, as follows:

First. That although through routes and joint rates were to be re-established, the Butler County Railroad should not receive out of the joint rates a greater amount than \$1.50 per car on the products of the mill of the Brooklyn Cooperage Company, even though the rates applied on the lumber, under the milling in transit provision, from all points on Appellee's road; and

Second. It was ordered that the divisions of all joint rates should be submitted to the Commission "for approval".

After this order was entered, the Butler County

Railroad Company applied to the Commerce Court for an injunction against the order and amended order of the Commission, in so far as they forbade the payment to the Butler County Railroad Company of a division out of the joint rates, re-established by such orders, greater than \$1.50 per car on the products of the mill of the Brooklyn Cooperage Company, and praying that the division of \$1.50 per car ordered by the Commission, so far as the products of the mill of the Brooklyn Cooperage Company were concerned, might be forever "enjoined, set aside, annulled and suspended".

The United States and the Interstate Commerce Commission answered the Bill and at the hearing, all of the record before the Interstate Commerce Commission, with reference to the Butler County Railroad Company, was admitted in evidence, and on November 28, 1913, the Commerce Court entered its final decree, as follows:

"It is ordered and adjudged that so much of the order of October 30, 1912, which reads as follows: '9. Provided further, that the allowances or divisions out of such joint rates to be paid by said principal defendants respectively, to the said last named parties to the record' (Butler County Railroad Company) 'on the products of the mills of the respective proprietary companies named in said report, shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the Commission, which are hereby fixed as maximum divisions or allowances thereon until further order, the Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful': be and the same is hereby vacated and set aside as to the petitioner herein." (Record, p. 105).

And thereupon an appeal was allowed to this Court.

Upon the foregoing statement of the case, we submit the following propositions:

I. The Commerce Court had jurisdiction of the complainant's Bill, and power to grant the relief prayed.

II. The Interstate Commerce Commission by its Supplemental Report of May 14, 1912, finds that the Butler County Railroad Company is a common carrier subject to the Act to Regulate Commerce.

III. The Interstate Commerce Commission required the Butler County Railroad Company, with the St. Louis & San Francisco Railroad Company and the St. Louis, Iron Mountain and Southern Railroad Company, respectively, to reestablish the through routes and joint rates theretofore in effect "in accordance with their respective tariffs", thereby fixing what was and is the proper and legal joint rate on lumber and forest products, from stations on the Butler County Railroad.

IV. Having fixed the proper and legal joint rate on lumber and forest products, the Commission had no power to prescribe the "proportion or division of such rate to be received by each carrier party thereto", unless the carriers "shall fail to agree among themselves upon the apportionment or division thereof".

V. It was beyond the power of the Commission to require that the Butler County Railroad Company should not receive out of the joint rate a greater sum than \$1.50 per car, as a division of the rates on lumber and forest products carried for the Brooklyn Cooperage Company, when at the same time providing for its proper division of the joint rate to the Butler County Railroad on traffic carried for other shippers, under the same tariffs, containing the provision as to milling in transit.

ARGUMENT.

I.

The Commerce Court Had Jurisdiction of the Complainant's Bill and Power to Grant the Relief Prayed.

The jurisdiction of the Commerce Court invoked in this case, was given by the following provisions of the Act establishing that Court, as contained in Section 207 of the Judicial Code of March 3, 1911:

"Section 207. The Commerce Court shall have the jurisdiction possessed by Circuit Courts of the United States and the judges thereof immediately prior to June 18, 1910, over all cases of the following kinds:

First: * * * * *

Second: Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission."

Under this Act, as construed by this Court in the case of *Procter & Gamble vs. United States*, 225 U. S. 282, the Commerce Court had "jurisdiction only to entertain complaints as to affirmative orders of the Commission", and our position is that the reading of the order of the Commission, here complained of, will demonstrate its affirmative character, and as said by the Chief Justice in the above case (page 293):

"No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves."

However, it is deemed proper to state the views we entertain as to the order and the jurisdiction of the Court.

This bill of complaint was filed in the Commerce

Court to enjoin, set aside and annul, "in part", the order of the Interstate Commerce Commission of October 30, 1912, and particularly Section 9 thereof.

In reading the order it will be observed that Section 3 thereof, names the principal defendants, and by Section 6 it is recited that the Butler County Railroad Company has "heretofore filed with the Commission" its petition "for the establishment or re-establishment of through routes and joint rates to interstate destinations", which said petition is filed on or consolidated with the record "herein", and on which a full hearing has been had. Therefore,

"7. It is ordered, That the said principal defendants above named be and they are hereby required, on or before January 1, 1913, to reestablish and for a period of two years to maintain with each of the said parties to the record last above named" (of which the Butler County Railroad Company was one), "the through interstate routes and joint rates in effect in accordance with their respective tariffs filed with this Commission on April 30, 1912." (Record p. 68.)

It can hardly be doubted that this requirement of the order was affirmative, and that it required the Butler County Railroad Company and the principal defendants to reestablish "the through interstate routes and joint rates in effect on April 30, 1912", and that such order required that such joint rates should be made effective "in accordance with their respective tariffs" which were on file with the Commission on April 30th, and which provided for the milling in transit privilege hereinbefore referred to. The reading of the order must be conclusive that so far it is affirmative.

There was the following in addition to the above order:

"Nine. Provided further, that the allowances or divisions out of such joint rates to be paid by said principal defendants, respectively, to the said last named parties to the record" (Butler County Railroad Company) "on the products of the mills of the said respective proprietary companies named in said report shall not exceed the divisions or allowances specified in the aforesaid supplemental report of the commission, which are hereby fixed as maximum divisions or allowances thereon until further order, the commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations, and are unlawful." (Record p. 68.)

It is obvious that the effect of this provision was an order to the principal defendants to pay to the Butler County Railroad Company the \$1.50 per car referred to in the supplemental report of the Commission (Record, p. 64), as a division out of the joint rate, and *no more than that amount*, and the Butler County Railroad Company was ordered to receive no more than that amount; and if this be the correct construction of the proviso aforesaid, it is apparent that this part of the order complained of was affirmative in character, and within the jurisdiction of the Commerce Court.

It is further to be observed that the Commission affirmatively fixes the \$1.50 per car "as maximum divisions or allowances" to the Butler County Railroad Company "on the products of the mills of the Brooklyn Cooperage Company", and this in effect was an order that the principal defendants should not pay, and the Butler County Railroad Company should not receive an allowance or division "out of such joint rates" fixed by the order, greater than \$1.50 per car.

The learned counsel for the United States say that

this case is governed by the case of *Hooker vs. Knapp*, 225 U. S. 302,—In that case the appellant applied to the Commission for the reduction of certain rates—The Commission reduced the rates but not to the extent demanded by appellant, who then filed his bill in the Commerce Court to enjoin and set aside the order of the Commission and praying for a mandatory injunction requiring the Commission to reopen the case and give him the relief which it had denied. The affirmative order of the Commission was in favor of appellant; the order to which an injunction was asked simply denied relief and this Court held that the *Procter and Gamble* case controlled the case. Here, however, the *Butler County Railroad Company* is required to join in the transportation, upon the payment to it of \$1.50 per car, out of the joint rate, which we submit was an affirmative order and not governed by the case of *Hooker vs. Knapp*.

It is quite true that the Commission in its general order classifying the carriers, adds the following:

“The Commission finding upon the record that any allowances or divisions in excess thereof result in undue preferences and unjust discriminations and are unlawful”; (Record, p. 68).

but, no effort is made by counsel to show how discrimination could occur, and as we will hereinafter show, there was absolutely no evidence in the Record upon which to base such a statement, so far as the case of the *Butler County Railroad Company* was concerned, and is but an illustration of the confusion and error brought about by putting that Company into an attempted classification of railroads under a general order, not applicable to it, while it *may be applicable* to some of the carriers in the class.

It seems needless to further argue that the part

of the order complained of was affirmative in character, and that the Commerce Court had jurisdiction to grant the complainant relief, by setting aside and annulling the same.

II.

The Interstate Commerce Commission by its Supplemental Report of May 14, 1912, finds that the Butler County Railroad Company is a Common Carrier subject to the Act to Regulate Commerce.

The order of the Commission of October 30, 1912, required the principal defendants to reestablish "the through interstate routes and joint rates in effect" with the Butler County Railroad Company "in accordance with their respective tariffs filed with this Commission on April 30, 1912". This order could only have been entered upon the finding of the Commission that the Butler County Railroad Company was a "carrier subject to the provisions of this Act" (Section 1 of the Act to Regulate Commerce), for only common carriers are subject to the Act to Regulate Commerce and to the jurisdiction of the Interstate Commerce Commission, and only a carrier subject to the Act to Regulate Commerce can be required by the Commission, under the provisions of the Act to Regulate Commerce, "to establish through routes and just and reasonable rates applicable thereto".

We, therefore, conclude that when the Commission entered its order requiring the establishing of joint rates by the Butler County Railroad Company and the principal defendants, it was a necessary part of the finding of the Commission *that each of the parties to such through route and joint rate should be a common carrier and subject to the provisions of the Act to Regulate Commerce.*

Counsel for the United States frankly admit that:
"It is fairly to be implied that the Commission found it (Butler County Railroad) to be a common carrier of the products of the proprietary mill."

III.

The Interstate Commerce Commission required the Butler County Railroad Company, with the St. Louis & San Francisco Railroad Company and the St. Louis, Iron Mountain and Southern Railway Company, respectively, to reestablish the through routes and joint rates theretofore in effect "*in accordance with their respective tariffs*", thereby fixing what was and is the proper and legal joint rate on lumber and forest products, from stations on the Butler County Railroad.

By its order of October 30, 1912, the Interstate Commerce Commission not only required the principal defendants, with the Butler County Railroad Company, to reestablish "*the through interstate routes*" which were in effect on April 30, 1912, but also required the Butler County Railroad Company and the principal defendants to reestablish the "*joint rates in effect in accordance with their respective tariffs filed with this Commission on April 30, 1912*"; so that the Commission not only required through routes, but fixed the amount of the "*joint rates*" which it required should be reestablished and provided that the same should be "*in accordance with their respective tariffs filed with this Commission on April 30, 1912*", which carried not only the rates, *but the milling in transit privilege covered by such rates.*

IV.

Having fixed the proper and legal joint rate on lumber and forest products, the Commission had no power to prescribe the "proportion or division of such rate to be received by each carrier party thereto", unless the carriers "shall fail to agree among themselves upon the apportionment or division thereof."

The provisions of the Act to Regulate Commerce as amended in 1906, which are applicable to the question here involved, will be here referred to and discussed.

Section 1 of the Act provides that "it shall be the duty of every carrier subject to the provisions of this Act * * * * to establish through routes and just and reasonable rates applicable thereto * * * * and providing for reasonable compensation to those entitled thereto". It will be observed that *it was the duty* of the principal defendants and of the Butler County Railroad Company, under Section 1, "to establish through routes and just and reasonable rates applicable thereto", and this means rates applicable to the through routes and where necessary, because the route covers the road of more than one carrier, *joint rates*; and where in operating such through routes it was necessary that more than one carrier participate in the traffic, they were required "to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein and *for the operation of such through routes*", and then the several carriers composing the through routes were required, of themselves, "to make reasonable rules and regulations * * * * providing for reasonable compensation to those entitled thereto".

The conclusion from this Section of the Act is ob-

vious that out of the "reasonable rates applicable" to through routes, *the several carriers were required* "to make reasonable rules and regulations" for the division or apportionment of the joint rates so as to provide "for reasonable compensation to those entitled thereto". The Act is mandatory that each party for the service over the through route, is to have fixed *by the carriers themselves* "reasonable compensation" for its service in "the operation of such through routes".

Prior to the amendment of the Act in 1906, there was no power given to the Commission or the courts to require the establishment of joint rates or to supervise the division thereof when made by the carriers. This clearly appears from the case of *Chicago & N. W. Ry. Co. vs. Osborne*, 52 Fed. 912 (C. C. A., Eighth Circuit), in which the opinion was delivered by Mr. Justice Brewer, sitting on the Circuit, and at page 915 it is said:

"No power existed at common law, and none is given by the Act, to Court or Commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads or to unite in a joint tariff." (Cases cited). "The whole matter is left to the voluntary action of the companies; and in forming by agreement any joint tariff *the basis of division and the proportion of moneys each shall take is also a matter left to their determination.*" (Italics ours).

In that case a writ of certiorari to the Circuit Court of Appeals of the Eighth Circuit was denied by this Court, 146 U. S. 354.

Congress, however, was not satisfied that the carriers would make joint rates when necessary and therefore enacted the foregoing provisions requiring the establishing of joint rates and by Section 15 the Com-

mission was given power to require the carriers to establish through routes and joint rates; and in order to insure that the carriers would deal fairly among themselves, and provide satisfactory compensation to each carrier rendering service in "the operation of such through routes", it was further provided, by Section 15 of the Act, as amended in 1906, as follows:

"Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order." (Italics ours).

By this provision Congress intended that if the carriers "in obedience to an order of the Commission", or "*otherwise*", having themselves established joint rates "shall fail to agree among themselves upon the apportionment or division thereof", that then the Commission, after a hearing, might prescribe "the just and reasonable proportion of such joint rate to be received by each carrier, party to the joint rate". Congress never intended to give to the Commission the power of prescribing the "apportionment or division" of the joint rate among the carriers parties thereto *unless and until the carriers failed* "to agree among themselves upon the apportionment or division thereof". The public is only interested that the division should give to each carrier "reasonable compensation" for services over the through route, and therefore the Commission is only authorized to act "*whenever*" the carriers "shall fail to agree". The condition must occur before the Commission is authorized to act.

This provision of Section 15 is in accord with the provision in Section 1, which requires the carriers *in the first instance* to provide among themselves "for reasonable compensation to those entitled thereto" in "the operation of such through routes"; and likewise by Section 15 the jurisdiction of the Commission is limited and can only be invoked "whenever the carrier or carriers * * * shall fail to agree among themselves upon the apportionment or division thereof".

The express condition upon which the Commission has jurisdiction to interfere, is that the carriers in the first instance *shall fail to agree among themselves*, and as was said by this Court in the case of *Interstate Commerce Commission vs. Northern Pacific Ry. Co.*, 216 U. S. 538, by Mr. Justice Holmes, at page 545:

"The condition in the Statute is not to be trifled away."

The only other pertinent provision of the Act as to joint rates and the divisions thereof, is a subsequent clause of Section 15 as follows:

"The Commission may also, after hearing on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged, and may prescribe the division of such rates *as hereinbefore provided*, and the terms and conditions under which such through routes shall be operated whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates."

In this provision the Commission is given power to "prescribe the division of such rates *as hereinbefore provided*," and this clause refers back to the provision of Section 15, which authorizes the Commission to pre-

scribe "the just and reasonable proportion of such joint rate to be received by each carrier party thereto", but only "*whenever the carrier or carriers * * * shall fail to agree among themselves upon the apportionment or division thereof.*" (Italics ours.)

We do not intend to suggest that the Commission might not interfere and forbid the use of divisions of joint rates among the carriers, which resulted in violation of other provisions of the Act, as to rebates or unjust discrimination or otherwise; but if the Commission undertakes to forbid established divisions on that ground, it can only act "after hearing" at which the evidence presented was sufficient to establish such violations of the Act, and then the Commission could prescribe "the just and reasonable proportion of such joint rates to be received by each carrier party thereto", only when based upon evidence before it, after due hearing.

In this case the evidence before the Commission, which will be found in the Record beginning at page 10, demonstrates that there was nothing before the Commission indicating that the divisions agreed upon resulted in any way in a violation of the Act, nor was evidence adduced on the subject of the divisions or apportionment of the joint rates, as between the Butler County Railroad Company and the principal defendants; and in fixing the "allowances or divisions out of such joint rates to be paid by said principal defendants" to the Butler County Railroad Company "on the products of the mills" of the Brooklyn Cooperage Company at \$1.50 per car, the Commission *acted arbitrarily and without the slightest evidence before it upon which to justify its action.* It was shown by the Record without controversy that every shipper on the line of the Butler County Railroad paid the same rate,

and that the divisions which the Butler County Railroad Company got out of the joint rates were hardly sufficient to pay operating expenses, and that there had never been a dividend upon its stock, held for the benefit of the Brooklyn Cooperage Company, referred to as the proprietary company, except once when four per cent. was paid out of a balance of money which the Butler County Railroad Company had borrowed, (See Record, p. 48).

It is true that in its supplemental report the Commission said, (Record, p. 64):

“This is a striking example of the advantages that an industry can get out of a tap line that it owns and holds out as a common carrier. The sugar company, as is well known, has important refining establishments at New Orleans and New York, and it is to its interests to have all the hardwood along the Butler County Railroad made available to it. The rates to New York and New Orleans are therefore so adjusted as to induce movements to those points and restrict movements to other points.”

While this statement of the Commission is not justified by anything in the Record, it is interesting to note that it refers to the Butler County Railroad as being owned by an industry, *which holds it out* “as a common carrier”, when the Commission in its order treats the Butler County Railroad Company *as a common carrier*, and in effect finds that it is such; and it is also interesting to observe that while the Commission apparently criticises the joint rates of the Butler County Railroad and other carriers from points on the Butler County Railroad to New York and New Orleans, by its order of October 30, 1912, the Commission *directs that these very same joint rates be reestablished over the through routes covered by the same*. It is

further interesting to inquire how the divisions of the joint rate **among the carriers** can result in inducing the movement of hardwood to New York and New Orleans and "restrict movements to other points"? The question of whether the traffic will move to a certain point depends on *what is the joint rate to that point* and not on what is the division of that rate among the carriers. The Commission approved the existing joint rates and ordered them to be reestablished, and it would seem to be absurd to say that the point to which the traffic will move can be influenced, not by the joint rates approved by the Commission, *but by the division of such rates among the carriers.*"

The Brooklyn Cooperage Company has never received any return upon the investment it has in the Butler County Railroad, but that road has furnished, as a carrier, to it and to the other shippers along its line, the transportation service necessary to the transaction of their traffic and the development of the country. The only possible difference between the situation of the Brooklyn Cooperage Company and the other shippers over the line of the Butler County Railroad, is that the Brooklyn Cooperage Company has an investment in the stock of the Butler County Railroad Company upon which it has never received a return. The transportation service covered by the rates, with the milling in transit privilege, is conducted for the Brooklyn Cooperage Company on exactly the same basis as for other shippers on the Butler County Railroad, and the Commission has found that the Butler County Railroad is a common carrier, and this finding is amply sustained by the facts of record, which it is not deemed necessary to here repeat.

Under the order of the Commission the same joint rates apply on the traffic of the Brooklyn Cooperage

Company and of other shippers, and the difference made is that upon the traffic of the Brooklyn Cooperage Company, under such order, the connections of the Butler County Railroad Company retain the whole of the joint rate, except \$1.50 per car; whereas on the traffic of other shippers, the joint rate is divided between the Butler County Railroad and its connections. The Commission has frequently held that the fact that a company shipping over a line of railroad, owns the stock of that road, does not determine the question of whether the road is a common carrier or not.

Thus in *Division of Joint Rates*, 10 I. C. C. Rep. 385, the Commission said (page 399):

“The mere fact that this road is today entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper, is not, in our opinion, controlling against the legality of the transaction before us. While there may be grave objections to allowing shippers to build and operate railroads over which their traffic moves, the Interstate Commerce Act contains no prohibition of that kind. This was so ruled by us in *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.*, 10 I. C. C. Rep. 193. We also held in *Re Allowances to Elevators by the Union P. R. Co.*, 10 I. C. C. Rep. 309, that the Union Pacific Company might pay an elevator Company for transferring grain from its cars to the cars of its connections at Council Bluffs, so long as the transaction was in good faith, even though the greater part of the grain so transferred belonged to the Elevator Company receiving the compensation.”

In *Crane Railroad Co. v. Philadelphia & Reading Ry. Co.*, 15 I. C. C. Rep. 248, at page 252, the Commission said:

“The mere fact that complainant’s road is owned by a corporation which also owns the stock

of the largest shipper over it, and that it was originally organized and built for the purpose of doing the work of that shipper, is not in our opinion controlling against its being held a common carrier."

If the Butler County Railroad Company is a common carrier, it would seem clear that any distinction between shippers, on account of stock ownership of one of the shippers, in the division of rates which the Butler County Railroad Company receives, would obviously be arbitrary and beyond the power of the Commission, unless there was evidence showing that the Butler County Railroad Company was a mere device, and in that case, it would not be a *bona fide* common carrier.

In the case of *Malvern & Freeo Valley Railroad Co. v. Chicago &c. Ry. Co.*, 182 Fed. 685, the Court said, (p. 688):

"If complainant is a common carrier it must be entitled to its share of interstate rates. The law enjoins that very thing upon the litigating parties, and it enjoins upon the Interstate Commerce Commission, upon proper showing and conditions, to enforce that law."

Therefore, the Interstate Commerce Commission having found that the Butler County Railroad Company is a common carrier, the difference in the divisions of the joint rates to the Butler County Railroad Company on traffic of the Brooklyn Cooperage Company and other shippers, is an arbitrary distinction, and does not accord to the Butler County Railroad Company, what it is entitled to under the Act, as a common carrier.

It is admitted by counsel for the United States (Brief p. 85) that the \$1.50 per car to the Butler Coun-

ty Railroad Company is a division to it out "of the joint rate" and not a mere switching charge.

We, therefore, submit that until it was shown to the Commission that the carriers failed to agree among themselves as to the apportionment or division of the joint rates which it had established, the Commission had no power to prescribe what should be "the allowances or divisions out of such joint rates to be paid by said principal defendants" to the Butler County Railroad Company, on the products of the mills of the Brooklyn Cooperage Company, and we further submit that the Commission had no power at any time to prescribe such allowances or divisions out of the joint rate, except "after hearing" and the presentation to it of evidence as to what should be "the just and reasonable proportion of such joint rate to be received by each carrier party thereto", and that when the Commission fixed \$1.50 per car as the division or allowance to the Butler County Railroad Company, out of the joint rate, it acted arbitrarily and beyond the powers conferred upon it by the Act to Regulate Commerce.

V.

It was beyond the power of the Commission to require that the Butler County Railroad Company should not receive out of the joint rate a greater division than \$1.50 per car on lumber and forest products carried for the Brooklyn Cooperage Company, when at the same time providing for proper divisions of the joint rate to the Butler County Railroad Company on traffic carried for other shippers under the same tariffs containing the provision as to milling in transit.

It will be observed that in its supplemental report

(Record, p. 64), the Commission refers to the \$1.50 per car to the Butler County Railroad Company as "a reasonable switching charge", while in its order of October 30, 1912 (Record, p. 68), it refers to this \$1.50 per car as "the allowance or division out of such joint rates", and by the order this amount is "hereby fixed as a maximum division or allowance thereon". See Brief for United States p. 85. So that by the order of the Commission it is clear that the \$1.50 per car is *an allowance or division to the Butler County Railroad* out of the joint rates applicable from points on its line, over the through routes with other carriers, to points of destination in other States, the tariffs covering which said rates also provide for the milling in transit privilege, which the Commission does not question but affirms and approves in directing that the joint rates shall be reestablished "*in accordance with their respective tariffs filed with this Commission on April 30, 1912.*"

The joint rates on lumber provided for under the tariffs of the Butler County Railroad Company and its connections, apply from all points on the Butler County Railroad where the logs are received, and under the milling in transit provision, the logs are carried under the lumber rate, with the additional charge of 1½ cents per 100 pounds on the logs when the milling in transit privilege is availed of. So that the service of the Butler County Railroad is the transportation of 4½ carloads of logs from the point on its line where they are received, to the mill where the lumber is manufactured, and then the transportation of one car of lumber from these logs from the mill to the connecting Trunk Line. For this service the Butler County Railroad Company, under the tariffs, gets its division out of the joint rate on one car of lumber, and in addition thereto 1½ cents

per 100 pounds on the logs for the milling in transit privilege.

This is the basis upon which transportation is conducted for all shippers under the tariffs, and if, under the order of the Interstate Commerce Commission, the Butler County Railroad Company can only receive \$1.50 per car out of the joint rate, for switching a car of lumber from the mill to the Trunk Line junction, it is evident that as to the traffic of the Brooklyn Cooperage Company, the Butler County Railroad Company is required to perform the service from the point where the logs are received to the mill, without compensation out of the joint rate other than \$1.50 per car, whereas it receives its full division out of the joint rates as compensation on the traffic of other shippers. On both classes of traffic the Butler County Railroad Company would receive 1½ cents per 100 pounds on the logs for the milling in transit privilege.

In its order the Commission requires the carriers to reestablish the joint rates in effect on April 30, 1912, both on the products of the mills of the Brooklyn Cooperage Company and on the products of the mills of shippers other than the Brooklyn Cooperage Company; but when it comes to the division or apportionment of the joint rates to the Butler County Railroad Company, while it leaves the divisions, theretofore in effect, upon traffic other than the products of the mills of the Brooklyn Cooperage Company, it limits the division of the Butler County Railroad Company on the products of the mills of the Brooklyn Cooperage Company to \$1.50 per car. Both the Brooklyn Cooperage Company and other shippers are entitled, under the order, to the milling in transit privilege provided for in the tariffs, and under this order it is easily demonstrated that the Butler County Railroad Company, if its revenues

are to be merely sufficient to operate the road, is required to discriminate in charges against the traffic of the Brooklyn Cooperage Company, and this is ordered by the Commission, simply and purely because *the entire capital stock of the Butler County Railroad Company is held by trustees for the benefit of the Brooklyn Cooperage Company.*

It is a sound proposition that an industrial company owning the stock of a common carrier railroad company should not thereby secure to itself a preference in rates. It is equally clear that an industrial company owning the capital stock of a common carrier railroad company should not be penalized by reason of its owning such stock, in the rates which it may have to pay for like service, and yet it is easily demonstrated that the order of the Commission complained of brings about this very discrimination, as follows:

If the shipment is by a shipper other than the Brooklyn Cooperage Company on cooperage stock on the line of the Butler County Railroad Company to New Orleans, upon which the rate is 17 cents per 100 pounds, the division of said rate to which the Butler County Railroad Company is entitled would be 3 cents per 100 pounds (Record p. 55). If on the other hand, the shipment was made by the Brooklyn Cooperage Company from a mill located in the same locality under the order and amended order of the Commission aforesaid, the Butler County Railroad Company would receive as its allowance or division out of such joint rate \$1.50 per car for its service, and therefore, in order to compensate the Butler County Railroad Company, it would have to add sufficient over and above the \$1.50 per car to the shipment made by the Brooklyn Cooperage Company, in order that it might receive for its services 3 cents per 100 pounds; and, therefore, the

Brooklyn Cooperage Company would be required to pay 3 cents per 100 pounds, (less \$1.50 per car), more than the other shipper in the same locality, in order that the Butler County Railroad Company might receive the same amount of revenue on the two shipments, and because of the stock ownership aforesaid in the Butler County Railroad Company, its connections would take the whole of the 17 cents per 100 pounds less \$1.50 per car.

We submit that this would require the Butler County Railroad Company to unjustly discriminate against the Brooklyn Cooperage Company and its shipments, in order that it might secure an equal amount of revenue from the two shipments above set forth.

The Brief on behalf of the Interstate Commerce Commission.

The learned counsel for the Interstate Commerce Commission has filed a brief in this case, but it is difficult to see the applicability of the greater part of it to this record. The Commission is now engaged in an investigation—"In the Matter of Additional Charges over present rates for Spotting Cars to Private Sidings"—and the first fifty pages of the brief filed here by the Interstate Commerce Commission is a theoretical discussion of that question, evidently prepared for filing therein, and we can see no place for such discussion upon the issues here involved.

In the case now under consideration, the Butler County Railroad Company hauls the logs *from its stations* to all the mills at Linstead, where the lumber is manufactured, and then hauls the lumber from the mills to the junction with the trunk line carriers. As heretofore shown, the lumber rates, under the tariffs, are made to apply from the stations on the Butler

County Railroad, where the logs are received, containing the lumber which finally moves from the mills; and; under the order of the Interstate Commerce Commission of October 30, 1912 (Record, pp. 64, 68), the Butler County Railroad Company and the trunk lines were required to re-establish "the through interstate routes and joint rates in effect, in accordance with their respective tariffs filed with this Commission on April 30, 1912", which rates applied on lumber from the stations of the Butler County Railroad, through the mill to the junction with the trunk lines, and thence to destination, with the milling in transit privilege, for which the shipper was charged 1-1/2 cents per 100 pounds, on the logs, in addition to the lumber rate; and by Section 9 of the order aforesaid, the Commission provides for an allowance or division "out of such joint rates to be paid" by the trunk lines to the Butler County Railroad, of \$1.50 per car on traffic of the Brooklyn Cooperage Company.

The service in transporting the lumber from the mill to the junction is not a switching service, but, as shown by the order of the Interstate Commerce Commission, is a part of the service in operating the through route, covered by the joint rates, and as admitted by the learned counsel for the United States (Brief, p. 85):

"The payment 'out of the rate' would seem to mean a division of the joint rate, not an allowance under Section 15; and the fact that it is described as 'a reasonable switching charge' and is measured by the carload rather than by the hundred pounds, does not militate against this interpretation."

It is obvious, therefore, that the transportation from the mills to the junction with the trunk lines is a part of the transportation service over the through

route. The Butler County Railroad does none of the interplant switching, which is done by the mill owners themselves.

In the brief of counsel for the Interstate Commerce Commission, (at page 52), it is said:

"These tap lines, therefore, are not entitled to through routes even if they be *bona fide* common carriers, when the service rendered is nothing more than switching cars of lumber from the mill to the main line."

This statement is entirely inapplicable to the case now under consideration, and as shown in their brief, (page 1) is addressed to the situation in the general Tap Line cases. The service of the Butler County Railroad begins at its station where the logs are received, and the haul from the mills to the junction is not a mere switching service, but is a part of the transportation service, over the "through route".

Again, at page 55 of brief for the Commission, which also was applicable to the general Tap Line cases, it is stated:

"Any practice, therefore, by line carriers, which relieves the mill owner of the reasonable charge for the transportation of logs, is a direct contribution to his net operating revenue."

In this case the mill owner is charged by the Butler County Railroad Company 1-1/2 cents per 100 pounds for the logs, and the division which the Butler County Railroad Company gets out of the joint rate covers the transportation *of the lumber in those logs*, from stations on the Butler County Railroad, to the junction with the trunk lines.

Again, at page 56 of the brief, which is still applicable under the statement of counsel, to the general Tap Line cases, the lumber rate is spoken of as apply-

ing "at the forest where the logs originated"; and then it is stated: "By this method a mill owner secures the transportation of the logs from the forest to his mill without paying anything for the transportation." This, also, is inapplicable to the present case, as shown above.

And again, at page 59, still applicable to the general Tap Line case, according to the statement of counsel, it is said:

"This practice of absorbing the log haul is a bald open contribution to the mill owner."

And this is equally inapplicable to the situation of the Butler County Railroad, for the log haul is paid for, by the shipper, and the charge is not absorbed.

Again, at page 65, which counsel say is applicable to the general Tap Line cases, it is stated:

"The investigation in this case has developed a wide spread commingling of the business of transportation with private business."

We challenge the accuracy of this statement, as applied to the Butler County Railroad. The Commission found no such condition, and there is absolutely nothing in the record upon which to base any such charge. The accounts of the Butler County Railroad Company were kept as required by the Commission. Monthly and annual reports were made to the Commission, and no part of its business is complicated with the affairs of any shipper on its line. The Brooklyn Cooperage Company has never received any return upon its investment, and it is not fair to make general charges of this kind, unsustained by the record or by the finding of the Commission.

At page 67 of the brief, the learned counsel refer to the Butler County Railroad Company, and state that

the logs "or timber from which this cooperage stock is manufactured, comes from the forests owned by the Great Western Land Company, and the logs are transported from the forests to the mill by the Butler County Railroad."

The logs from which the cooperage is manufactured by the Brooklyn Cooperage Company not only come from the lands of the Great Western Land Company, but from other timber purchased by it, (Record, p. 20) and the logs are transported, from the forests to the station or sidetrack of the Butler County Railroad, by the Brooklyn Cooperage Company and then transported by the Butler County Railroad (Record, p. 33). The Butler County Railroad Company does not transport the logs from "the forests to the mill" but only from its stations to the mill.

At page 68 of the brief, the learned Counsel say that for the trackage right from Lowell Junction to Linstead, over the Iron Mountain Railroad, the Butler County Railroad "pays only 65 cents per train mile for a train of twenty-five cars". The trackage right is based upon the usual charges, therefor, and no criticism is made of this by the Commission.

At page 69 of the Brief of learned Counsel, it is stated:

"the logging roads into the forests are not made common carriers for the reason that if they were the owners of segregated tracts of timber land could ship their logs over them. The great lumber companies prefer to hold a monopoly over the forests and thereby compel the sale of outside tracts to them as they need them. Through these two manipulations the large lumber companies seek (1) to monopolize the forests and (2) to secure, through the medium of through routes and joint rates and the milling in transit privilege, rebates from the published lumber rates."

We submit that this statement is entirely inapplicable to the case under consideration. The Commission made no such finding and upon the record could not have made such a finding as here set forth.

In the brief of Counsel, on pages 70 and 71, the charge of the Butler County Railroad for the log haul is spoken of as a "book charge against the Cooperage Company for hauling logs to its mill" and as a "mere book charge". There is absolutely nothing in the Record nor in the finding of the Commission upon which to base such a statement. It is clearly shown that all shippers are treated exactly alike and that the tariff of rates is collected from the Brooklyn Cooperage Company as from every other shipper and that upon such charges the Butler County Railroad Company bases its ability to operate the road, in the interest of all shippers, and no part of the charges collected from the Brooklyn Cooperage Company has ever been returned to it, by way of dividends, or otherwise.

Counsel, at the bottom of page 71 and top of page 72, of their brief, charge that the division of the through rate on traffic of the Brooklyn Cooperage Company is a "payment to the shipper" and "a plain, unequivocal absorption of the log haul of the cooperage company by the payment of a very large rebate". And further, it is stated "the power of monopoly is here also asserted".

Charges of this kind, not only unsustained by the record but clearly contradicted thereby and not in accordance with the finding of the Commission, we submit, should not commend this brief to the Court. The Butler County Railroad Company has been found by the Commission to be a common carrier. The record shows that it is doing a useful and necessary passenger and freight business; that all of its patrons are served fairly and exactly alike, and learned Counsel

for the Commission should not go out of the record, to embarrass this railroad company in its effort to build up the country through which it operates. Upon the record in this case, we challenge any charge of unfair treatment of anybody or that the operations of this Company are conducted for any improper purpose. The charge of giving or receiving a rebate, is a serious one and should not be loosely and carelessly made, without the slightest evidence to support the charge.

We submit, that the decree of the Commerce Court should be affirmed.

WM. A. GLASGOW, JR.,
JAMES M. BECK,
Counsel for Appellee.

March 27th, 1914.

TAP-LINE CASES.

FILED

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MAHER
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

UNITED STATES,	Appellant,	No. 829.
vs.		
LOUISIANA & PACIFIC RAILWAY COMPANY et al.,	Appellees.	
UNITED STATES,	Appellant,	No. 831.
vs.		
WOODWORTH & LOUISIANA CENTRAL RAILWAY COMPANY, et al.,	Appellees.	
UNITED STATES,	Appellant,	No. 833.
vs.		
MANSFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,	Appellees.	
UNITED STATES,	Appellant,	No. 835.
vs.		
VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 830.
vs.		
LOUISIANA & PACIFIC RAILWAY COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 832.
vs.		
WOODWORTH & LOUISIANA CENTRAL RAILWAY CO., et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 834.
vs.		
MANSFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	No. 836.
vs.		
VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,	Appellees.	

ON APPEAL FROM THE UNITED STATES COMMERCE COURT.

REPLY BRIEF FOR APPELLEES.

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
FOR APPELLEES.



IN THE
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ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	} No. 834.
vs. MANSFIELD RAILWAY & TRANSPORTATION COMPANY, et al.,	Appellees.	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,	Appellant,	} No. 836.
vs. VICTORIA, FISHER & WESTERN RAILROAD COMPANY, et al.,	Appellees.	

ON APPEAL FROM THE UNITED STATES COMMERCE COURT.

REPLY BRIEF FOR APPELLEES.

We have been furnished with the corrected brief on behalf of the Interstate Commerce Commission in manuscript form. We are therefore unable to make references to the particular pages of the brief to which this reply is directed. We shall, however, quote verbatim from the Commission's brief, in order that the court will have no difficulty in knowing the particular matter to which this reply is directed.

The first subdivision of the Commission's brief presents the following propositions:

"1. A tap line is not entitled to a 'division' of the line lumber rate for performing a switching service. Where the carriers absorb the switching service at the points of origin of lumber traffic, the shipper or its tap line may be allowed, under Section 15, a reasonable switching charge for performing the switching service."

By this we understand that counsel for the Commission distinguishes between the term "division" and the term "allowance," and between the term "transportation" and the term "switching." This is shown by the sentence in the brief under the heading, "A switching service cannot be an integral part of a through route," reading as follows:

"Here it may be well to observe the difference between the words 'allowance' and 'division,' as used in the statute. The former applies to allowances made to a shipper under Section 15 for services which the carrier can be compelled to perform, but which he allows the shipper to perform. The word 'division' applies only in cases of through routes, to the portions of the joint rate which each line carrier receives. If the services performed by a shipper is a switching service, the allowance will be a switching charge, that is, a charge per car, and such

allowances have been made to tap lines. They complain of this and say they want a 'division.' The reason for this is apparent. A switching charge would be from \$1.50 to \$5 per car. The divisions which have been improperly allowed by carriers were on the theory that a switching movement was a part of the through route, and 'divisions' were made ranging from two to four cents per 100 pounds, making the 'allowance' to the shipper or its tap line \$12 to \$18 and \$20 per car. Of course, they want 'divisions.' But the character of the service must always determine the compensation. If the service is switching the allowance will be a switching charge; if it be a line haul over part of a through route there will be a 'division' of the joint rate."

From these quotations it seems apparent that counsel for the Commission are of the opinion that the petitioner railroads are switching roads, do not perform a line haul, and are entitled, if to anything, only to an allowance and not to a division. The vice in the argument on behalf of the Commission lies in the fact that it is a complete reversal of the terms used by the Commission in the Tap Line opinion, and of the Commission's conference rulings. The court will observe from the Tap Line decision that the words "division" and "allowance" are used interchangeably. Indeed, in prescribing the division out of the joint rate to be accorded lines recognized by the Commission as common carriers, the term "division" has been used by the Commission where the distance did not exceed one mile. The argument on behalf of the Commission is that switching is not an integral part of a through route and cannot be covered by a joint rate.

In the case of the Trinity Valley & Northern Rail-

road, 23 I. C. C. 624 (Opinions, orders, etc., page 144), the Commission finds the distance over which the lumber is hauled by the Trinity Valley & Northern to the Texas & New Orleans Railroad, to be "about one mile," and to the Frisco "nearly five miles." On the following page, when fixing the amount to be paid out of the joint rate, the Commission says:

"In this case we think that, with respect to the products of the mill of the lumber company, any division out of the rate to the tap line in excess of one cent per 100 pounds would be unlawful. We fix that as the maximum."

In many places in the opinion Commissioner Harlan refers to "allowances" as covering the entire compensation paid to any tap line. On page 7 (Opinions, Orders, etc.), speaking generally under the heading "Discriminations resulting from allowances," the Commission says:

"That discriminations grow out of these contributions by the public carriers to certain of the lumber interests in Arkansas, Missouri, Texas and Louisiana, is apparent on the face of the record. The *allowances* paid range from a minimum of $\frac{3}{4}$ of a cent to six cents per 100 pounds. In the competition of carriers for the traffic *allowances* as high as seven cents per 100 pounds have been paid out of a 14-cent rate, where the haul of the tap line was a matter of feet and yards, while the haul of the carrier itself approximated 400 miles. The amount of the *allowance* seems not to be governed definitely by the extent or character of the service said to be performed by the tap line, but to result to some extent from the bargain made between the carrier and the lumber company. In one case a tap line, operating six miles of main line, receives *allowances* of three and four cents per

100 pounds, while a few miles away another tap line, operating 12 miles, receives but one to two and one-half cents per 100 pounds, depending upon destination; in each case the public carrier performs all the service between the mill and its own tracks."

In the case of the following lines among others the Commission uses the term "allowance" in describing the earning out of the joint rate given the tap line: Malvern and Freco Valley (Opinions, Orders, etc., page 23); Arkansas & Gulf (Opinions, Orders, etc., page 27); Arkansas Eastern Railroad (Opinions, Orders, etc., page 34).

The term "division" is used in connection with the Little Rock, Maumelle & Western Railroad (Opinions, Orders, etc., page 30); Beirne & Clear Lake Railroad (Opinions, Orders, etc., page 31); Beardon & Ouachita (Opinions, Orders, etc., page 33); For-dyce & Princeton Railroad (Opinions, Orders, etc., page 40).

All of these lines just named were found by the Commission to be mere plant facilities of the proprietary traffic, and the haul ranged from less than 1,000 feet to more than three miles. Taking the following roads which were recognized as common carriers of the proprietary traffic, we find in the case of the following among others the use of the term "division:" Timpson & Henderson (Opinions, Orders, etc., page 141); Shreveport, Houston & Gulf (Opinions, Orders, etc., page 142); Groveton, Lufkin & Northern (Opinions, Orders, etc., page 143); Moscow, Camden & St. Augustine (Opinions, Orders, etc., page 143).

The term "allowance" is used by the Commis-

sion in the following cases with respect to roads recognized by the Commission as common carriers of the proprietary traffic: Mississippi Valley Railroad (Opinions, Orders, etc., page 153); Warren & Ouachita Valley Railway (Opinions, Orders, etc., page 77); Crittenden Railroad (Opinions, Orders, etc., page 98).

In the case of the Doniphan, Kensett & Searcy Railway, the Commission held (page 84):

“For its service in *switching* products of the controlling mill through Kensett, a distance of six miles, to the Rock Island at Searcy, the latter may *allow* the Doniphan, Kensett & Searcy a *division* out of the rate of one cent per 100 pounds.”

In the case of the Moscow, Camden & St. Augustine Railway (Opinions, Orders, etc., page 143), the Commission found the tap line receiving at the time of the hearing for the haul from the mill to the trunk line at Moscow, “a distance as heretofore stated of seven miles * * * a *division* out of the joint rates of from one to four cents per 100 pounds.” The Commission states (page 144) in this case:

“We are of the opinion that an *allowance* out of the rate of $1\frac{1}{2}$ cents per 100 pounds may lawfully be paid to the Moscow, Camden & St. Augustine on the products of the mill of the proprietary company.”

We have gone to the trouble of pointing out these statements of the Commission in its decision, in order to demonstrate to this court that counsel for the Commission, in now undertaking to distinguish between these terms, is drawing a distinction which the Commission never recognized in its opinion.

As to the appellees, the Commission describes the earnings of the Tap-line out of the joint rate as follows: In the case of the Louisiana & Pacific (Opinions, Orders, etc., page 594), as "allowances," where the average haul is 20 miles on the finished product; in the case of Woodworth & Louisiana Central (Opinions, Orders, etc., page 327), as "allowances" for a haul of six miles on 95 per cent. of the lumber; in the case of Mansfield Railway & Transportation Company (Opinions, Orders, etc., page 587), as "allowances" for a haul three-quarters of a mile to two and a half miles; in the case of the Victoria, Fisher & Western (Opinions, Orders, etc., page 602), "allowances" is the term used for a haul from a half to one mile. We thus find as to all of these appellees the Commission uses the term "allowances" as covering a movement either within the switching limit of three miles or a line haul averaging 20 miles. In all of these instances the Commission has ignored the movement of the logs to the mill ranging from a few miles to more than 30 miles.

Furthermore, the Commission has never recognized the term "line haul" in fixing rates, and has never recognized that the term "joint rate" is affected by the length, character or kind of carriers participating in the through route.

In Tariff Circular No. 18-A, in effect during all of the time covered by the tap line investigation, and in effect today, page 3, the Commission defines the term "joint rate" as follows:

"The term 'joint rate,' as used herein, is construed to mean a rate that extends over the lines of two or more carriers and that is made by agreement between such carriers.

‘Joint tariffs’ are those which contain or are made up from such joint rates.”

In Rule 10 (b) of Tariff Circular No. 18-A, page 24, the Commission provides:

“If a joint rate applies to or from a point on a terminal or switching road, and such terminal or switching road receives a division of said rate which is not absorbed by a connecting carrier, the terminal or switching road must publish, post and file, or concur in or post, the tariff containing the joint rate.”

In the brief and argument by counsel for the Commission there appears an effort to distract the attention of the court from the questions involved in the tap line appeal, and to draw from the court some expression of opinion as to what service the carrier should perform under the transportation charge, to sustain some preconceived notion by counsel for the Commission in a matter, as he stated to the court, now under investigation by the Commission as to what service should be performed upon a private sidetrack without additional charge. We do not understand that the views expressed by the counsel for the Commission are the views of the Commission. Nor do we understand that counsel claims for the views expressed in his brief that he has the sanction of the Commission. The opinion of the Commission speaks for itself, and by that opinion and its orders this court must determine the position of the Interstate Commerce Commission.

Counsel for the Commission, in discussing the alleged switching movement ignore entirely the transportation service performed in hauling the log to the mill, and treat only of the movement of the fin-

ished product. They state that the haul of the logs was done free, when in fact the record discloses that the rates published in the tariffs at the time of the investigation by the Commission covered the transportation of the log not from the tree but from the junction of the lumber company's logging road with the tap line to the mill, and the transportation of the lumber from the mill over the tap line to the trunk line.

As indicating the situation as far as milling in transit is concerned at the time of the Commission's investigation, and as answering the argument of counsel for the Commission as to the situation on the Rock Island, we call attention to the following provision in the tariff of the Chicago, Rock Island and Pacific Railway, in effect April 30, 1912, I. C. C. No. C-9235, item 17, page 45, reading as follows:

"Shipments of logs or lumber moving from points on lines named below may be stopped at points on those lines or at junction point of delivery to the C. R. I. & P. Ry., for the purpose of storing, sawing, re-sawing, or further manufacture into articles described in this tariff, and through rate from point of origin to final destination applied on the commodity re-shipped."

Sixteen lines are mentioned, including the appellee, Woodworth & Louisiana Central Railway.

The item further provides as to the appellee Louisiana & Pacific:

"Shipments moving from off the Louisiana & Pacific Railway may be stopped at points on that line or at its junction with the New Orleans, Texas & Mexico Railroad, for the purpose of storing, sawing, re-sawing, or further manufacture into articles described in this tariff, and

the through rate from points of origin to final destination, as in effect date shipment moved from original point of origin applied to the commodity re-shipped."

The Frisco's present tariffs provide (Supplement No. 3 to I. C. C. No. A-65) :

"When one carload of lumber produced from logs transported at the above rate, is delivered to the O. & N. W. R. R. for shipment to final destination, the freight charges on three and one-half cars of such logs will be refunded; it being understood that the amount so refunded shall not exceed the joint proportion of the O. & N. W., B. S. L. & W. and N. O. T. & M. R. R. Cos. of the through rate on the one car of lumber."

The present tariff of the Vicksburg, Shreveport & Pacific Railway (Supplement 22 to I. C. C. No. 2679) provides:

"Logs may be shipped from stations on the Vicksburg, Shreveport & Pacific Railway shown in Tariff and Supplements to Vicksburg, Miss., for the purpose of being manufactured into lumber, and the manufactured product may be re-shipped via the Alabama & Vicksburg Ry. and Meridian, Miss., to points in Ohio and Indiana, under the following conditions:

The logs must be waybilled to Vicksburg, Miss., at a proportion of 6 cents per one hundred pounds, on basis of actual weight, subject to minimum weight of 30,000 pounds when one car is used, and 24,000 pounds for each car when more than one car is used, and delivery made to, and freight charges collected on the aforementioned basis from consignees. When the manufactured product is offered for reshipment, the Alabama & Vicksburg Ry. agent at Vicksburg, Miss., is authorized, on surrender of inbound paid freight bills, not over six months old (see Note), covering movement of three

pounds of logs in, for every one pound of manufactured product out, to refund to the consignee at Vicksburg, Miss., the amount collected on the inbound movement on basis of three pounds in, for every one pound out, and waybill the re-shipment to final destination at the difference between 6 cents per one hundred pounds and the through rate on lumber from original point of shipment, in effect at the time the logs left point of origin, on basis of actual weights, subject to minimum weight on lumber published in tariff and supplements, allowing lines beyond Meridian, Miss., their proportion of the through rate, and the balance of the difference to the Alabama & Vicksburg Ry. The amount refunded must be shown as 'advanced charges,' and reference to the inbound billing must be indicated on the outbound billing."

These tariffs are cited to show that at the time of the hearing, and at the present time, trunk line railroads were and are hauling logs to the mill and the lumber thence under the blanket rate, and the division out of the joint rate includes the haul of the logs to the mill, and the lumber from the mill to the connecting line, or final destination.

These tariffs further show that at the time of the hearing before the Commission the Kirby Lumber Company, the chief complainant against the tap-line railroads before the Commission, had the benefit of the blanket rate covering the movement of its logs to its mills and the lumber thence to final destination. That practice which was then in existence is, as shown by these tariffs, in effect to-day so that we have the Commission denying to these appellee lumber companies located upon these appellee tap-line railroads, the application of the joint or blanket rate even upon movement of their lumber from their mills

to final destination, while it has not interfered with the tariffs of the Frisco and other railroads which are giving to the Kirby Lumber Company the joint rate not only upon its lumber from its mill to final destination, but also include the haul of the log to the mill.

As showing what the Commission considered to be the practice on milling-in-transit as long ago as the Central Yellow Pine decision, 10 I. C. C. 214 to 216, we set forth the following quotation:

When these logs start for the mill it is certain, and may readily be a matter of agreement, that the entire product will go forward to destination. If the logs were shipped from a point upon the main line of one of these defendants to the mill at the local rate, we do not think that an adjustment of the rate in and of the rate out, when the lumber went forward, which would treat the lumber shipment as originating where the logs did, would be illegal as a matter of law. To hold otherwise would simply compel the moving of these mills to the vicinity of the timber and this although entailing much expense would benefit nobody.

Once admitting the legality of the principle of milling in transit, whether it shall be extended to a particular case, must depend largely upon the facts. Under all the circumstances disclosed by the record before us, we think that this practice may be permitted here, but this holding extends the application of that principle to the extreme limit.

It appears that some, perhaps all of these defendants, now make what is known as a rough material rate upon logs from points upon their line to the mill. These tariffs specify that the low rate shall apply only in case the product is shipped out over the defendant line. Whether a carrier may apply a lower rate to the transportation of raw material to a given mill which ships

the product out over its line than it applies for the same service to another mill, which disposes of the product otherwise, is not decided. What we hold is that the shipment of the log to the mill and the lumber from the mill may, under the circumstances of this case, be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered, and that the carrier may make such allowance toward the cost of moving the log as would be fairly involved in moving the lumber from that point and that it may do this by joint arrangement with the carrier bringing the log to the mill, provided that carrier is a common carrier by rail.

It will be noted that in our opinion these divisions can only be granted when the logging road is a public carrier which actually makes a joint through rate, and it was urged in argument that there can be no difference in effect between a common carrier which brings these logs to the mill and a private carrier which discharges the same service. It would be a sufficient answer to this that the law permits the allowance in one case and not in the other, but there is a practical answer as well. The common carrier is subject to public control, its tariffs must be filed according to law, it must report to governmental authority, it must obey the law obligatory on such carriers. These logging roads develop with the country, passing by almost imperceptible progress from carriers of logs to carriers of general merchandise and often of passengers. The same considerations which require that railroads in general should be subject to public supervision apply to these lines.

One further observation should be made. While the public as a rule has no concern in the division of through rates and while the statute does not require the publication of the proportions into which such rates are divided among the carriers, we think these divisions stand somewhat different. The transportation first of the

log and then of the lumber involves the exercise of the right to mill in transit. Where that privilege is granted to grain, cotton, or other commodities, the fact should be and usually is plainly stated upon the tariff, together with the conditions upon which the privilege will be allowed. In this case the only way of stating the value of that privilege to the mill owner is by giving the division which is allowed the tap-line, since that division is in all cases, even if the road be a distinct and independent corporation, an allowance for the benefit of the mill. We think, therefore, that the tariffs should state upon their face that the transportation provided for covers the carriage of the logs to the mill and the lumber from the mill, and that the division which is allowed the tap-line should in all cases be named."

Counsel for the Commission, under a heading "Errors of Fact," referring to alleged errors made by the Commerce Court as to the effect of the Commission's report and order, allege, first, that the Commerce Court erred in holding that the Commission had held that switching service within three miles of a trunk line was a transportation service. We find some difficulty in reaching a satisfactory interpretation of counsel's statement. At any rate, the Commission did hold that the movement from a mill within the three-mile limit to the trunk line was a transportation movement, and that the trunk line railroad could make a joint rate covering the movement over that three miles, and over the trunk line to destination, and that a joint rate lawfully might be applied to the combined movement, provided the tap-line was recognized by the Commission as a common carrier.

Counsel allege that the Commerce Court erred in its fourth statement as to the Commission's holding:

"For switching products of the non-proprietary mill an allowance may be given, and, in the case of a common carrier tap line, a division out of the through rates should be made."

Counsel for the Commission says that this is incorrect, stating, "This is not the fact, for a purely switching service a switching allowance is made either to the shipper or to the tap line performing the service, and without any regard to whether it be proprietary or non-proprietary lumber." That this statement of counsel is incorrect is shown by the amended order of October 30, 1912 (Paragraph 11, Opinions, Orders, etc., page 184) :

"It is further ordered that, in case of the failure of the principal defendants to re-establish, on or before January 1, 1913, the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of the respective proprietary companies, in the case of any of the parties to the record first hereinabove named, the Commission will, upon proper petition herein, enter an order requiring the establishment of such through routes and joint rates, or enter upon an inquiry with respect thereto.

It is further ordered that the divisions of all joint rates herein required and authorized to be re-established on traffic other than the products of the mills of the several proprietary lumber companies, shall be submitted to the Commission by the parties hereto, for approval."

These paragraphs of the order demonstrate beyond all question that in all instances the payment out of the joint rate either for switching a distance of less than three miles, or for a haul of greater than three miles, a division of the joint rate must be made to the tap line on nonproprietary traffic.

These paragraphs also show conclusively the application of the ownership doctrine of the Commission, by the segregation of proprietary and nonproprietary as to the application of joint rates.

Counsel is in error in stating that allowances were made to two of the tap lines before the court for proprietary as well as nonproprietary traffic. Of these lines only one received a switching allowance for the movement from the mill to the trunk line on the finished product. No division of the joint rate was accorded to any of the appellee railroads for the movement of the logs to the mills and the lumber to the trunk line.

Counsel assign as a third error of fact by the Commerce Court the finding in the sixth paragraph (Opinions, Orders, etc., page 206), to the effect that the blanket rate is to be extended beyond the three mile limit for a mill with a common carrier tap line connection to the trunk line, provided only that the mill be not a proprietary interest as to the tap line. Counsel assert that this is not a fair statement of the Commission's finding, and quote from the opinion of the Commission as follows:

"But where a mill is more than three miles distant from a trunk line, and is connected with it by a tap line organized as a common carrier, and so recognized by this Commission, the mill is to be regarded as a shipping point equally with all other mill points in the extensive rate group which the trunk line covers, as defined in this territory."

The imported qualification as to the tap line is that it must be organized as a common carrier *and so recognized by the Commission*. It is therefore

plain that the Commission held that if a mill be a proprietary mill more than three miles distant from the trunk line, it would not be entitled to the blanket rate unless the tap line be recognized by the Commission as a common carrier, and since, in the case of all four of the appellees there was no such recognition by the Commission, it follows that the proprietary mill more than three miles from the trunk line would not be entitled to the joint rate, while the non-proprietary mill on the lines of the appellees more than three miles from the trunk line is entitled to the joint rate.

We therefore find that the Commerce Court was right as to all three of these alleged errors of fact, and that there is no proper criticism against their statement.

In every observation made by the Commission's counsel, there is the qualification either that the Commission recognized the tap line as a *bona fide* common carrier, or that the service performed was not in fact a plant service.

We have said this much as to the new matter in the brief for the Commission because we did not want this court to understand that any of the argument advanced by the Commission's counsel had the support even of the Commission itself. We see that in all decisions the Commission has recognized that a joint rate is divided between the carriers participating, and that the share which each of the carriers received was denominated "allowance" or "division." The term "switching" does not cover any particular haul, long or short, and generally is intended to apply to the movement by one carrier for

another trunk line in making delivery within so-called switching limits in large terminals. The Commission provides in its rules, as we have before shown, for the application of a joint rate over even a switching movement.

We further have shown that the movement of the logs to the mill under the joint rate or blanket rate is not a free service; that in the decision in the Central Yellow Pine case the Commission correctly describes such movement as lawful; that the milling in transit there accorded is substantially that which was in effect upon the tap-lines at the time of the Commission's decision and in effect upon many of the trunk lines today. There was no free service, there was no unlawful discrimination and the Commission, by its construction of the statute and its application to the facts in these cases has by sheer denomination deprived the appellee railroads of their legitimate existence as common carriers of all traffic and has denied to the appellee lumber companies the benefits of the joint rate solely because of the ownership of the two companies. There have been disputes as to questions of fact. We are content to leave our statements for measurement by the record. The Commission has not justified in any sense its contentions that the Commerce Court was wrong or answered our contentions that the order of the Commission was unjust and unlawful and we therefore respectfully submit that the decree should be affirmed.

Respectfully submitted,

H. M. GARWOOD,
W. R. THURMOND,
LUTHER M. WALTER,
For Appellees. ✓